MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

Aliina Vegar

THE OBLIGATION ON ABOLITIONIST STATES TO WITHHOLD ASSISTANCE IN FOREIGN PROCEEDINGS THAT MAY RESULT IN DEATH PENALTY

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Abstract for Master´s Thesis

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Author: Aliina Vegar

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Abstract:

In 2018, the UK Home Secretary agreed to provide information on two prisoners facing capital charges in the US, despite the US refusing to provide assurances that the death penalty will not be sought for the individuals in question. This decision was made despite the UK's status as a death penalty abolitionist State, and despite its ratification of the International Covenant on Civil and Political Rights ("ICCPR") and the European Convention on Human Rights ("ECHR"). Upon challenge in 2019, the UK Queen's Bench upheld the Home Secretary's decision, in the case *Maha Elgizouli*. While the UK Supreme Court overturned the Queen's Bench decision in 2020, its rationale rested on the UK's data privacy law, with the majority asserting that international law and UK common law had not yet developed so as to recognise an obligation on abolitionist States to withhold the provision Mutual Legal Assistance ("MLA") to retentionist States for use in criminal proceedings that may result in death penalty, in the absence of assurances that capital punishment will not be imposed.

This study examines the accuracy of this assertion in the international context. When considering the extent to which abolitionist States can be held responsible in these circumstances, we are presented with a complex web of international legal doctrine. This study considers how the relevant rules and principles operate and interact, with the aim of determining and clarifying the conditions in which abolitionist States party to the ICCPR and/or the ECHR may be held responsible for facilitating the use of the death penalty through the provision of MLA. By considering the law of State responsibility for internationally wrongful acts alongside relevant human rights law stemming from the ICCPR and the ECHR, this study asserts that such an obligation can be discerned from these conventions (especially considering that both instruments prohibit abolitionist States from extraditing or expelling individuals where there is risk they will face capital punishment in the receiving State). However, this study outlines that, from a jurisdictional standpoint, there are factual and conceptual differences between extradition and provision of MLA, which may impede a finding of direct State responsibility in the circumstances of this study.

Accordingly, this study moves to examine the law on State complicity in the death penalty. Through examining State responsibility for "aid and assistance" per the International Law Commission's Articles on State Responsibility, the "obligation to protect" in human rights law, and the concept of complicity in other contexts of the human rights framework, this thesis arrives at the conclusion that if jurisdictional limits of the ICCPR and the ECHR obstruct a finding of *primary* responsibility of the abolitionist State, *derivative* responsibility can still be established in these circumstances, for the State's "aid or assistance" in capital punishment.

Key words:
Mutual Legal Assistance, death penalty, complicity, state responsibility, internationally wrongful acts, obligation to protect, extradition, extraterritorial jurisdiction, non-facilitation, right to life, *lex specialis*.

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The abstract is approved as a maturity test:

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Abbreviations and Acronyms

CoE	Council of Europe
CAT	The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT Committee	Committee Against Torture
ECHR	The European Convention on Human Rights
ECHR Protocol 6	Protocol 6 to the European Convention on Human Rights
ECHR Protocol 13	Protocol 13 to the European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	The Charter of Fundamental Rights of the European Union
FTF	Foreign Terrorist Fighters
HRC	Human Rights Committee
ICCPR	The International Covenant on Civil and Political Rights
ICCPR OP 2	Second Optional Protocol to the International Covenant on Civil and Political Rights
ICC	The International Criminal Court
ICJ	The International Court of Justice
ICTY	The International Criminal Tribunal for the former Yugoslavia
ILC	The International Law Commission
ILC Articles	The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts
JCHR	Joint Committee on Human Rights (UK parliament)
MLA / Assistance	Mutual Legal Assistance
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America
UNGA	United Nations General Assembly

1. Introduction

1.1. Background to the Study

Mutual legal assistance (herein "MLA" or "assistance") is a practice through which one State provides assistance to another State with evidence and/or intelligence, which is used in the criminal investigation and prosecution for offences in the latter State.[1] The prosecuting or judicial authority of one State makes a specific request to another State for assistance,[2] including for "the provision of evidence, documentary or viva voce, for use abroad; the search and seizure of evidence for use in foreign proceedings; the transfer of witnesses for interview; and the serving of documents originating in another jurisdiction."[3] With our increasingly globalised world, it is clear that States need to cooperate with one another in this manner, in order to sufficiently investigate and prosecute various criminal matters. However, a legal, political and moral dilemma emerges when abolitionist States provide MLA to non-abolitionist States, and that assistance facilitates the use of the death penalty.[4]

MLA is largely a creature of treaty law, both multilaterally (such as the European Convention on Mutual Legal Assistance in Criminal Matters)[5] and bilaterally (many bilateral treaties are modelled on the United Nations ("UN") Model Law on Mutual Assistance in Criminal Matters).[6] There is no explicit statement in any of these treaties that MLA *must* be withheld without obtaining assurances that judicial execution will not be imposed ("Death Penalty

[1] Bharat Malkani, "The Obligation to Refrain from Assisting the Use of the Death Penalty", in *International and Comparative Law Quarterly,* vol. 62(3), pp. 523-556, 2013, p. 541.
[2] *Ibid.*
[3] Robert Currie, "Human Rights and International Mutual Legal Assistance: Resolving the Tension", *Criminal Law Forum,* vol. 11, pp. 143-181, 2000, (page number unknown – no page numbers provided in SSRN version of text download).
[4] Bharat Malkani, Written Submission to the Human Rights Committee: *General discussion on the preparation for General Comment on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights,* 14 July 2015, para. 5.
[5] European Convention on Mutual Assistance in Criminal Matters, concluded 20 April 1959, entered into force 12 June 1962, ETS No.030, Council of Europe.
[6] General Assembly, *Model Treaty on Mutual Legal Assistance in Criminal Matters,* A/RES/45/117, 14 December 1990. See also *supra.,* (note 4), Bharat Malkani (Written Submission to the HRC), para. 8.

Assurances"). However, many abolitionist States have policies stating that they will *consider* withholding MLA in the absence of death penalty assurances.[7]

The European Convention on Human Rights ("ECHR") and the International Covenant on Civil and Political Rights ("ICCPR") prohibit their State parties from extraditing individuals to death penalty retentionist States, where there is foreseeable risk of the death penalty being imposed (and where the State has not first obtained assurances that the individuals will not be subjected to capital punishment). What is not clear, however, is whether this prohibition extends to circumstances beyond extradition, namely to the situation where abolitionist States wish to provide MLA to retentionist States, where such assistance may similarly facilitate the use of the death penalty in the MLA-receiving State.

This issue has been highlighted in the recent United Kingdom ("UK") decisions in the case *Maha Elgizouli,* first examined by the Queen's Bench,[8] and then, on appeal, by the Supreme Court.[9] This case concerned MLA requests to aid in the prosecution of a British individual (now stripped of his citizenship), who allegedly belonged to an Islamic State cell involved in the murder of hostages in Syria. The Queen's Bench controversially found that it was lawful for the UK Home Secretary to authorise the provision of MLA to the United States ("US"), in support of the criminal investigation that could lead to prosecution for offences that carry a death penalty sentence, without first obtaining assurances that the death penalty will not be imposed.[10] While the Supreme Court overturned the Queen's Bench decision, it did so on the basis of the MLA consisting of personal data within the meaning of the Data Protection

[7] See e.g. Gov.UK website, "UK Overseas Security and Justice Assistance Guidance", Annex B: Checklist for case specific assistance, published 15 December 2011, last updated 26 January 2017, available at: https://www.gov.uk/government/publications/overseas-security-and-justice-assistance-osja-guidance (last accessed 14 April 2020), stage 3, para. 9. This document sets out procedures that should be followed by British authorities when providing MLA, and states that "a) Written assurances *should* be sought before agreeing to the provision of assistance that anyone found guilty would not face the death penalty", and "b) Where no assurances are forthcoming or where there are strong reasons not to seek assurances, the case should automatically be deemed 'High Risk' and FCO Ministers should be consulted to determine whether, given the specific circumstances of the case, we should nevertheless provide assistance." (italics added, underlining found in original). See also *supra.,* (note 4), Barhat Malkaini (written submission to the HRC), paras. 8-12.

[8] *The Queen (on the application of Maha El Gizouli) v The Secretary of State for the Home Department*, Judgment of 18 Jan 2019, High Court of Justice Queen's Bench Division, United Kingdom, CO/3449/2018.

[9] *Elgizouli (Appellant) v Secretary of State for the Home Department (Respondent)*, Judgment of 25 March 2020, Supreme Court, United Kingdom, [2020] UKSC 10. (Note in Queen's Bench case, surname spelled "El Gizouli", and in Supreme Court case "Elgizouli". This study adopts the latter spelling).

[10] *Supra.,* (note 8), *Maha Elgizouli* (QB decision), paras. 65-66, 96, 218.

Act 2018,[11] concluding that the decision to provide such information was unlawful under Part 3 of that Act.[12] On the other ground of appeal, whether it was unlawful for the UK to facilitate the use of the death penalty in a foreign State through provision of MLA,[13] the majority found that the law had not yet developed so as to prohibit provision of MLA in such circumstances.[14] However, Lord Kerr's judgment disagreed with the majority, finding the Home Secretary's decision to provide MLA without requisite assurances unlawful on both grounds of appeal.

1.2. Research Aim and Question

Although *Maha Elgizouli* is a domestic rather than an international decision, this case highlights the lack of certainty in this area (especially given that the UK Human Rights Act incorporates the ECHR into UK domestic law).[15] The problem addressed in this study has yet to be scrutinised on an international level, relevant conventions are silent on the subject, and even esteemed Supreme Court justices disagree on the status of international and domestic law on the matter. More than two thirds of States worldwide have abolished the death penalty in law or in practice,[16] and thus the clarification of legal obligations would impact a large number of States, as well as clarify the extent of relevant fundamental rights for individuals in such circumstances. With States routinely providing MLA to one another

[11] Data Protection Act, United Kingdom, Royal Assent 23 May 2018, 2018/c/12. The Act deals with, among other aspects, the transfer of personal data to third countries or international organisations, setting out general conditions which apply to such transfers. The SC found the conditions were not met. The Act and reasoning will not be analysed in this study, as it is outside of the ambit of this thesis.
[12] *Supra.,* (note 9), *Maha Elgizouli* (SC decision), para. 3.
[13] This ground of appeal was also raised by the Queen's Bench as a question of public importance: "Whether it is unlawful for the Secretary of State to exercise his power to provide MLA so as to provide evidence to a foreign state that will facilitate the imposition of the death penalty in that state on the individual in respect of whom the evidence is sought." *Supra.,* (note 9), *Maha Elgizouli* (SC decision), paras. 3 and 19.
[14] *Supra.,* (note 9), *Maha Elgizouli* (SC decision), para. 4.
[15] See Human Rights Act 1998, United Kingdom, Royal Assent 9 November 1998, 1998/c/42.
[16] Statistics of July 2018 – Number of States who are Abolitionist for all crimes: 106; Abolitionist for "ordinary crimes" only: 8; Abolitionist in practice: 28. Total Abolitionist in Law or in Practice: 142; Total Retentionist: 56. Statistics available from: Amnesty International, "Abolitionist and Retentionist Countries as of July 2018", index: 50/6665/2017, (State list, published July 2020), available at: https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf, (last visited 23 March 2020). This study relates only to those abolitionist States party to the ECHR and the ICCPR. For figures, see notes 28, 29, 34, 35 and 48 (ratification figures of the ECHR and the ICCPR and their death penalty-related protocols).

in criminal matters, and with the emerging challenge presented by the prosecution of Foreign Terrorist Fighters ("FTF"),[17] there is a growing need for legal clarity in this area.

Therefore, this study aims to clarify abolitionist States legal obligations, by answering the following research question: Are death penalty abolitionist States who are party to the European Convention on Human Rights and/or the International Covenant on Civil and Political Rights prohibited from providing Mutual Legal Assistance to death penalty retentionist States for use in criminal proceedings that may result in prosecution for offences carrying the death penalty, when the abolitionist State has not obtained adequate assurances from the retentionist State that the death penalty will not be imposed?

1.3. Method and Material

To answer this research question, this thesis adopts a doctrinal method, employing legal research methodology. This study discerns and analyses the current status of the law by locating and examining the relevant primary and secondary sources of law governing the field of this study. More specifically, the status of the law in this area is ascertained through analysing applicable primary sources (in this context, particularly the law codified in relevant international conventions); whereby the meaning and interpretation of relevant provisions is determined through examining secondary sources, namely the jurisprudence of relevant judicial and quasi-judicial bodies, and the discussions of highly qualified academics (as subsidiary means for determining the rules of law). The relationship between relevant legal rules and principles is analysed, with the aim of solving the aforementioned ambiguities in the existing law, and exposing what the law *is* in the studied area.

The primary legal sources used are the ECHR and the ICCPR. Death penalty-related additional protocols of the respective conventions are also analysed, as they codify crucial international law for the question at hand. As the text of the Charter of Fundamental Rights of the European Union ("the EU Charter") is, by reason of being a younger instrument, in

[17] See Resolution 2178, adopted by the United Nations Security Council, S/RES/2178, 24 September 2014. "Foreign Terrorist Fighters" defined as "...individuals who travel to a State other than their State of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict."

conformity with the ECHR position on this matter (as a manifestation of the more modern view of European states), and it is only applicable when European Union ("EU") law is being applied, the EU Charter will only be used to emphasise the existence of European consensus on death penalty abolition and the prohibition of extradition where there is risk of capital punishment. When parallels are being drawn between complicity in torture and complicity in death penalty, this study also analyses aspects of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").

While analysis of the ICCPR in this study is relevant from a global perspective (owing to the content and vast global ratification of the ICCPR), the ECHR's relevance is limited to Council of Europe ("CoE") Member States (thus it is only relevant from the regional perspective of Europe). The reason this thesis also examines the regional perspective of Europe in this regard it threefold: 1) out of the regional human rights systems, Europe is the only wholly death penalty abolitionist region (with the exception of Belarus, which is not a Member State of the CoE),[18] whereby the question of non-facilitation of death penalty arises more frequently in the European context; 2) capital punishment contravenes the ECHR,[19] whereas it does not, in and of itself, contravene other overarching regional human rights conventions (but for the aforementioned EU Charter, also relevant only from a European perspective); 3) lending to points 1 and 2, there is significant jurisprudence of the European Court of Human Rights ("ECtHR") which very applicable and useful for the question of this study (regarding non-facilitation of capital punishment, prohibition of extradition to face the death penalty and so on), and this jurisprudence is applicable to the region of Europe as a whole.

To provide authoritative interpretation to the relevant ECHR and ICCPR rights, this study analyses secondary sources, most notably, jurisprudence of the ECtHR and of the Human Rights Committee ("HRC"). Only leading or otherwise notable cases in the relevant areas are analysed, due to the large body of case law of both the ECtHR and HRC. This includes, but is not limited to, jurisprudence establishing the ECHR and HRC's positions on the death penalty, cases outlining (and providing a rationale for) the prohibition of extradition to States where there is risk of imposition of death penalty, and cases establishing and widening the

[18] CoE has 47 Member States, including all of Europe except for Belarus (see Council of Europe Website, "Our Member States": https://www.coe.int/en/web/about-us/our-member-states, last visited 11 May 2020).
[19] See an analysis of the ECHR's prohibition of death penalty under subheading 2.1. of this study.

scope of the respective conventions extraterritorial protective ambit. The HRC's General Comments are also utilised, as they are authoritative and comprehensive interpretations of substantive ICCPR rights and ICCPR State Party obligations.

The International Law Commission's ("ILC") Articles on the Responsibility of States for Unlawful Acts ("ILC Articles") will also be analysed in this study. The legal status of these Articles is unresolved in the international community, some suggesting they are secondary sources or evidence of law, while others arguing they represent customary law (which would make them a primary source of law as per Article 38(1)(b) of the Statute of the International Court of Justice).[20] The ILC Articles have not been transformed into a convention, rather the document was drafted and adopted by the ILC, and then adopted as a resolution of the United Nations ("UN") General Assembly ("UNGA"). However, the ILC Articles "are extensively used and quoted in international practice and [in] the jurisprudence of national and international tribunals",[21] and "referred to in arguments before international tribunals, in arbitral decisions, in state practice and in separate opinions of the International [Criminal] Court".[22] The position adopted in this study is that the ILC Articles on State Responsibility are not a "source of law", and rather are "evidence of a source of law".[23] While they may not be primary rules, the Articles on State Responsibility and the ILC Commentary are highly authoritative sources in terms of the establishment of State responsibility. This lends to the authoritative nature of both the ILC and the UNGA,[24] the elaborate process through which the Articles were drafted and adopted,[25] and the extensive use of the Articles before international courts, tribunals and general international practice.

For further interpretive aid, this study utilises academic discussions located in relevant

[20] Statute of the International Court of Justice ("ICJ"), annexed to the Charter of the United Nations, concluded 26 June 1945, entry into force 24 October 1945, 33 UNTS 993, Article 38(1).
[21] Robert Kolb, *The International Law of State Responsibility: An Introduction,* Cheltenham, UK: Edward Elgar Publishing, 2017, pp. 27-30.
[22] James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", in *The American Journal of International Law*, vol. 96(4), 2002, p. 889.
[23] David Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority" in *The American Journal of International Law*, vol. 96(4), pp. 857-873, 2002, p. 867. For discussions on authoritative nature of ILC and the Articles, especially regarding the special position of the ILC, and process through which the Articles were drafted, see pp. 867-872. See also ICJ Statute, Article 38(1)(d), whereby work of the ILC may be seen similar in authority to the writings of highly qualified publicists (thus a "subsidiary means for the determination of rules of law").
[24] *Ibid.,* David Caron, pp. 867-872.
[25] See, e.g. James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 60, discussing how the ILC Articles were drafted through prolonged discussion over several decades.

journal articles and textbooks (as secondary sources) regarding State responsibility for internationally wrongful acts, the law on complicity, applicable ECtHR and HRC jurisprudence, and questions of jurisdiction. The UK domestic decisions regarding *Maha Elgizouli* are only analysed insofar as demonstrating the legal issue.

1.4. Limitations

Provision of MLA in the context of this study is only one way that abolitionist States may be said to facilitate the extraterritorial use of the death penalty. There are several other ways that abolitionist States' actions may be argued to contribute to the death penalty, including, but not limited to, police-to-police assistance (where police force of one State aid the police force of another State), provision of funds and other resources to tackle transnational crimes like drug trafficking, provision of materials that are used in executions, provision of financial, technical and other forms of support to strengthen foreign legal systems and so on.[26] However, in order to maintain sufficient thematic focus, this study analyses facilitation of death penalty solely from the perspective of provision of MLA. This is also due to the author's view that out of the above given examples, provision of MLA in criminal proceedings that may result in the death penalty is a form of assistance most proximate to the prohibited conduct (judicial execution). Many of the arguments forwarded in this study may also be relevant for other forms of death penalty facilitation.

Furthermore, as mentioned earlier, the legal status of the ILC Articles on State Responsibility is unconfirmed. However, this thesis will not delve into the discussion regarding the authoritative status of the ILC Articles, as the question is worthy of thorough analysis in its own right. On a similar reasoning, this study will not analyse the difference between primary rules of law and secondary rules of law in relation to the ILC Articles. While the topic is interesting, in that the distinction between the concepts is often blurred, the discussion is not directly relevant for the question of this thesis.

Furthermore, as referred to in the preceding paragraph, this study is predominantly focussed on the ICCPR and the ECHR. While the question of non-facilitation of capital punishment is

[26] *Supra.,* (note 4), para. 7.

also interesting from the perspective of the Inter-American and the African regional systems, in order to maintain sufficient focus, this study limits its analysis to the stated conventions.

Finally, there is also growing argument that abolitionist States are legally obliged to assist their nationals who are facing the death penalty abroad (that being that State discretion to provide diplomatic protection to its nationals is tempered in cases involving abuses of fundamental human rights, which capital punishment is increasingly being classified as).[27] If such an obligation exists, it may add weight to the argument that abolitionist States are consequently also prohibited from providing MLA to assist in capital punishment, at least in relation to their own current or former nationals. However, whether or not such an obligation exists it is an elaborate question, which would require extensive research and analysis in its own right. Thus, in order maintain sufficient focus, this study does not address this matter any further.

[27] *Supra.,* (note 1), Bharat Malkani, p. 524.

2. The Obligation to Seek Assurances, and Withhold Assistance in the Absence of Assurances: a Human Rights Perspective

Within the human rights framework, two multilateral human rights treaties that have wide membership and lay out much relevant law for the case at hand are the ECHR[28] and the ICCPR.[29] The legal norms within the ECHR and ICCPR, and the jurisprudence of their monitoring bodies, are vital for the question of whether abolitionist States are obliged to obtain assurances before providing MLA in foreign criminal proceedings that may result in judicial execution. Specifically, case law relating to the right to life,[30] and the right to be free from torture and inhuman or degrading treatment or punishment,[31] especially in the context of extradition to face the death penalty, can be drawn on for the context of this study.

This chapter analyses relevant ICCPR and ECHR doctrine, exposing and examining how these conventions may impose an obligation on abolitionist States to obtain death penalty assurances before providing MLA in foreign proceedings that may result in the death penalty, or withhold MLA in the absence of such assurances. The reader is alerted at this stage that jurisdictional counter arguments exist, which will be comprehensively analysed in the following chapter. The analysis of the present chapter is first and foremost relevant for establishing primary responsibility of the abolitionist State (where breach of such an obligation would entail the direct responsibility of the State in question, as opposed to derivative responsibility for complicity).[32] However, the discussions of this chapter are also drawn on in Chapter 5, for analysis of the question of complicity in capital punishment.

[28] European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), as amended by Protocols 11 and 14, concluded 4 November 1950, entered into force 3 September 1953, ETS No. 5. 47 State parties, including all of Europe except for Belarus, ratification of ECHR is a prerequisite for joining the Council of Europe (see Council of Europe Website: https://www.coe.int/en/web/human-rights-convention/home (last visited 24 March 2020)).
[29] International Covenant on Civil and Political Rights ("ICCPR"), concluded 19 December 1966, entered into force 23 March 1976, UNTS vol. 999. Ratified by 173 States (see United Nations Office of the High Commissioner for Human Rights website, "status of ratification dashboard", available at https://indicators.ohchr.org/ (last visited 24 March 2020)).
[30] ECHR Article 2, ICCPR Article 6.
[31] ECHR Article 3, ICCPR Article 7.
[32] For differentiation, see Chapters 4 and 5. For assessment of complicity in death penalty attracting derivative State responsibility, refer especially to Chapter 5.

2.1. The ECHR and the ICCPR Positions on the Death Penalty

Both the ECHR and the ICCPR textually allow the death penalty as an express exception to the right to life.[33] In the context of the ECHR, however, it is likely that the law within the Council of Europe ("CoE") framework has evolved as to prohibit the death penalty in all circumstances. This follows from the fact that most State parties have ratified the optional protocols to the ECHR abolishing the death penalty (first in peacetime,[34] and later in all circumstances[35]), and those States that have not ratified the relevant optional protocols[36] show consistent State practice in observing a moratorium on capital punishment.[37] Thus, in *Al-Saadoon and Mufdhi v the UK,* the ECtHR considered that these factors are "strongly indicative that Article 2 has been amended as to prohibit the death penalty in all circumstances."[38]

The EU framework supports this position. Article 2 of the EU Charter provides that "No one shall be condemned to the death penalty".[39] The EU's absolute opposition to death penalty is also supported by other EU documents,[40] including, among others, the 2013 EU Guidelines on Death Penalty, which set out "strong and unequivocal opposition to the death penalty in all times and in all circumstances";[41] the 2016 EU Regulation 2016/2134, concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or

[33] ECHR Article 2(1) – "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."; ICCPR article 6(1) – "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." ICCPR, Article 6(2) – "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant"

[34] Protocol No. 6 to the ECHR, concerning the abolition of the death penalty, concluded 28 April 1983, entered into force 1 March 1985, ETS No. 114 ("ECHR Protocol 6"). – As of 20 March 2020, 46 member states have ratified Protocol 6, and Russia has signed but not ratified (see CoE website, convention list: www.coe.int/en/web/conventions).

[35] Protocol No. 13 to the ECHR, concerning the abolition of the death penalty in all circumstances, concluded 3 May 2002, entered into force 1 July 2003, ETS No. 187 ("ECHR Protocol 13"). – As of 24 March 2020, 44 member states have ratified Protocol 13. Armenia has signed but not ratified this Protocol. Russia and Azerbaijan have not signed (see CoE website, convention list: www.coe.int/en/web/conventions).

[36] *Supra.,* (notes 34 and 35).

[37] *Al-Saadoon and Mufdhi v the United Kingdom*, European Court of Human Rights, Judgment of 2 March 2010, Application No. 61498/08, para. 120.

[38] *Ibid.*

[39] Charter of Fundamental Rights of the European Union ("EU Charter"), concluded 7 December 2000, entered into force 1 December 2009, 2000/C 364/01, European Union, Article 2(2).

[40] See *supra.,* (note 9), *Maha Elgizouli* (SC Decision), Lord Kerr, para. 126.

[41] Council of the European Union, *EU Guidelines on Death Penalty,* 8416/13 COHOM 64 PESC 403 OC 213, published 12 April 2013.

degrading treatment or punishment (with a specific focus on the death sentence rather than the generalised prohibition on inhumane treatment or torture);[42] and paragraph 71 of the European Union's Law Enforcement Directive, which obliges a data controller to "take into account that the personal data will not be used to request, hand down or execute a death penalty or any form of cruel and inhuman treatment" before providing/transferring data to a foreign law enforcement authority.[43] Considering the positions of both the CoE and the EU in this regard, it is now considered that the death penalty has been removed from the European framework.[44]

Regarding the ICCPR, Article 6(1) protects the right to life, while Article 6(2) provides that non-abolitionist States may, under strict circumstances, impose the death penalty.[45] It is apparent from Article 6 that abolition is preferred.[46] This is supported by the HRC General Comment 6, in which the HRC provides that "abolition is desirable."[47] Furthermore, the Second Optional Protocol to the ICCPR ("ICCPR OP 2"),[48] "Aiming at the Abolition of the Death Penalty", provides that "No one within the jurisdiction of a State Party to the present Protocol shall be executed,"[49] and that "Each State Party shall take all measures to abolish the death penalty within its jurisdiction."[50] Thus, State parties to ICCPR OP 2 are abolitionist States, prohibited by the ICCPR from imposing judicial execution within their jurisdiction.

As mentioned above, both the ECHR and the ICCPR also codify the right to be free from torture and inhuman or degrading treatment or punishment (ECHR Article 3, and ICCPR

[42] European Parliament and Council of the European Union, Regulation (EU) 2016/2134, *concerning trade in certain goods which could be used for capital punishment, torture, or other cruel, inhuman or degrading treatment or punishment,* document 32016R2134, 23 November 2016, para. 71.
[43] European Parliament and Council of the European Union, Directive (EU) 2016/680, (European Union's Law Enforcement Directive), *on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences, and on the free movement of such data,* Document 32016L0680, 27 April 2016.
[44] With the exception of Belarus, which is not a CoE Member State (see note 18).
[45] See (note 13) above.
[46] Amrita Mukherjee, "The ICCPR as a 'Living Instrument': The death penalty as cruel, inhuman and degrading treatment", in *The Journal of Criminal Law,* 68(6), pp. 507-519, 2004, p. 508.
[47] General Comment No. 6, Human Rights Committee, *Article 6: right to life*, UN Doc. HRI/GEN/1/Rev.6, 12 May 2003, para. 6. Note, General Comment 6 has now been replaced by: General Comment No. 36, Human Rights Committee, *Article 6: right to life*, UN Doc. CCPR/G/GC/36, 30 October 2018.
[48] Second Optional Protocol to the International Covenant on Civil and Political Rights ("ICCPR OP 2"), aiming at the abolition of the death penalty, concluded 15 December 1989, entered into force 11 July 1991, UNTS vol. 1642. Ratified by 88 States, (see United Nations Office of the High Commissioner for Human Rights website "status of ratification dashboard": https://indicators.ohchr.org/ (accessed, 24 March 2020)).
[49] ICCPR OP 2, Article 1(1).
[50] ICCPR OP 2, Article 1(2).

Article 7). Originally the death penalty, in and of itself, was not found in either context to constitute treatment contrary to the right to be free from torture and inhuman or degrading treatment or punishment. Rather, certain methods of execution and death row conditions were deemed in both contexts to contradict ECHR Article 3 and ICCPR Article 7.[51] However, as discussed at 2.2.2.1. and 2.2.2.2. below, the law has since developed to consider that extradition to face the death penalty in and of itself constitutes treatment contrary to the right to be free from torture or inhuman or degrading treatment or punishment in both contexts.

2.2. Prohibition of Extradition Without Obtaining Death Penalty Assurances

Both the ECHR and the ICCPR protective ambits have evolved to prohibit abolitionist States from extraditing individuals where there is a real risk of facing the death penalty in foreign States (without having obtained appropriate death penalty assurances). This is so, despite a lack of express prohibition to that effect in either convention.

2.2.1. When There Was No Obligation to Refuse Extradition

In the early 1990s, there was no specific legal obligation on abolitionist States to refuse extradition to retentionist States to face judicial execution.[52] In the ECHR context, this was clear from the case, *Soering v the UK*,[53] where the applicant argued that his proposed extradition to the US would violate his rights under the ECHR, as it would expose him to a real risk of being subjected to the death penalty. While the ECtHR did find that the UK was prohibited from extraditing Soering, it was not based on a finding that extradition would violate his right to life, as Article 2(2) explicitly allows for death penalty. Rather, they relied

[51] For ECHR, see e.g. *Soering v the United Kingdom*, European Court of Human Rights, Judgment of 7 July 1989, Application No. 1438/88 – which established the *non-refoulement* principle in the ECHR (derived from Article 3). In this case, extradition was not permitted on the grounds that the long wait on death row would amount to treatment contrary to ECHR Article 3, due to the associated fear, uncertainty and human anguish; For ICCPR, see e.g. *Francis v Jamaica,* Human Rights Committee, Views adopted 3 August 1995, Communication No. 606/1994, paras. 91-92 – where the Applicant's long wait on death row and associated deterioration of the Applicant's mental state (satisfying the requirement for "further compelling circumstances" for finding violation), was found to be treatment contrary to ICCPR Article 7.
[52] *Supra.,* (note 1), Bharat Malkani, p. 533.
[53] *Supra.,* (note 51), *Soering v the UK*, "death row phenomenon" contrary to Article 3.

on the conditions and manner in which the death penalty would occur, whereby the risk of suffering the "death row phenomenon" while awaiting execution was found to be treatment contrary to Article 3.[54] Thus, during this time, if there were no aggravating factors igniting Article 3 (like the "death row phenomenon"), extradition to face the death penalty was permissible for CoE member States.

During this time, the ICCPR approach was similar. In *Kindler v Canada*,[55] the HRC upheld the Canadian Supreme Court decision that the risk of death penalty did not in and of itself oblige Canada to refuse extradition in the absence of death penalty assurances.[56] The HRC elaborated that Canada had no duty to demand death penalty assurances in the case.[57]

2.2.2. The Obligation to Refuse Extradition

2.2.2.1. The ECHR and the EU Charter

Regarding the ECHR, the law concerning extradition to face ECHR-contrary treatment has since developed, leading to the widely accepted position that the ECHR now prohibits contracting States from extraditing or otherwise expelling individuals to face the death penalty in retentionist States. This prohibition is no longer dependent on the death-row phenomenon, nor the manner or conditions of detainment constituting treatment contrary to ECHR Article 3. The ECtHR has found that extradition to face the death penalty itself violates ECHR Article 3,[58] as well as Article 2.[59] The ECtHR's conclusion that the death penalty itself violates Article 3 can be seen in the aforementioned case *Al-Saadoon and*

[54] *Ibid., Soering v UK,* para. 111.
[55] *Kindler v Canada,* Human Rights Committee, Views adopted 30 July 1993, Communication No. 470/1991.
[56] Original Canada Supreme Court case: *Kindler v Canada (Minister of Justice),* Judgment of 21 February 1991, Supreme Court, Canada, 2 SCR 779. See also *supra.,* (note 1), Bharat Malkani, p. 532.
[57] *Ibid.*, (note 55), *Kindler v Canada (HRC),* para. 14.6.
[58] *Al Nashiri v. Poland*, European Court of Human Rights, Judgment of 16 February 2014, Application No. 28761/11, para. 577: "Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering."; see also *supra.,* (note 37), *Al-Saadoon and Mufdhi v the UK,* para. 144, where the ECtHR found that, regardless of eventual result, the applicants had been subjected "to the fear of execution by the Iraqi authorities." This alone amounted to psychological suffering to the nature and degree required to contravene ECHR Article 3.
[59] *Ibid., Al Nashiri v Poland,* paras. 579; and *F.G. v Sweden*, European Court of Human Rights, Judgment of 23 March 2016, Application No. 43611/11, para. 110.

Mufdhi v the UK, where the ECtHR concluded that "the death penalty, which involved the deliberate and premeditated destruction of a human being by the State authorities, causing physical pain and intense psychological suffering as a result of the foreknowledge of death, could be considered inhuman and degrading and, as such, contrary to Article 3 of the Convention."[60]

In *Al-Saadoon and Mufdhi v the UK,* where the ECtHR also accepted that State practice is likely to have amended Article 2 to prohibit death penalty in all circumstances,[61] the ECtHR was asked to consider the legal ramifications of the transfer of prisoners to stand trial in Iraq. The ECtHR found that the transfer presented real risk of the applicants being subjected to capital punishment, and found that "Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there."[62] The ECtHR stated that:

> "[T]he Court considers that, in the absence of any such binding assurance, the referral of the applicants' cases to the Iraqi courts and their physical transfer to the custody of the Iraqi authorities failed to take proper account of the United Kingdom's obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13 since, throughout the period in question, there were substantial grounds for believing that the applicants would face a real risk of being sentenced to death and executed."[63]

In *Al Nashiri v Poland,* concerning unlawful rendition, the ECtHR found that Poland's assistance in the applicant's transfer from Poland to the US violated both Article 2 and 3 of the ECHR, due to the real and foreseeable risk that the applicant would be exposed to capital punishment in the US. In arriving at this conclusion, the ECtHR provided that: "Article 2 of the Convention prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there."[64] The ECtHR reiterated this position in *F.G. v Sweden,* and found, due to risk of capital punishment, Sweden would be in violation of both

[60] European Court of Human Rights Registry, *Press release of the ECHR: Chamber Judgment of Al-Saadoon and Mufdhi v the United Kingdom*, *Application No. 61498/08,* press release published 2 March 2010.
[61] See "ECHR and ICCPR positions on death penalty" (subheading 2.1 above).
[62] *Supra.,* (note 37), *Al-Saadoon and Mufhdi v the UK,* para. 123. The ECtHR unanimously found violation of Article 3. In finding that Article 3 was violated, the ECtHR decided in did not need to consider whether the same facts constituted a violation of Article 2 (see paras. 144-145 of judgment).
[63] *Ibid.,* para. 143.
[64] *Supra.,* (note 58), *Al Nashiri v Poland,* paras. 576-579.

Articles 2 and 3 if they returned the applicant to Iran without an *ex nuc* assessment by the Swedish authorities of the consequences of this action. In coming to this conclusion, the ECtHR stated that:

> "At the outset the Court observes that in the context of expulsion, where there are substantial grounds to believe that the person in question, if expelled, would face a real risk of capital punishment, torture, or inhuman or degrading treatment or punishment in the destination country, both Articles 2 and 3 imply that the Contracting State must not expel that person."[65]

Thus, despite the absence of a provision to this effect, it is now widely accepted that the ECHR prohibits contracting States from extraditing or otherwise expelling individuals where there are substantial grounds for believing that the individual would face a real risk of being subjected to the death penalty. If an individual were to be extradited or expelled in such circumstances, this conduct would contradict both Articles 2 and 3 of the ECHR. Extradition may only be permissible in such circumstances upon obtaining assurances from the receiving State that the death penalty will not be imposed.[66]

Again, the EU framework supports this legal position. Article 19(2) of the EU Charter, as a younger instrument, textually reflects this evolved legal perspective. The EU Charter explicitly provides that in the EU Member States, "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty […]"[67]

2.2.2.2. The ICCPR

This approach has also been followed by the HRC. While the ICCPR textually allows for death penalty under certain strict circumstances (as discussed above), and does not expressly prohibit extradition to face the death penalty in foreign States, the law has evolved to reflect the CoE and EU positions outlined above (in respect of abolitionist State parties).

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[65] *Supra.,* (note 59), *F.G. v Sweden,* para. 110.
[66] Bernadette Rainey, Elizabeth Wicks, & Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th edition, Oxford University Press, 2017, p. 152. See e.g. *Al Nashiri v. Poland* (note x), para. 589, where the ECtHR required the Polish government to seek assurances from the US authorities that the Applicant will not be subjected to the death penalty.
[67] EU Charter, Article 19(2).

The HRC reversed its decision in *Kindler v Canada,* in the case *Judge v Canada*.[68] In *Judge v Canada,* the HRC reflected that "there has been a broadening international consensus in favour of abolition of the death penalty",[69] meaning that "[f]or countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application."[70] In *Judge v Canada,* the HRC recognised that if an abolitionist State exposed an individual to risk of death penalty in that manner, it would violate the right to life under the ICCPR.[71] This is an important development as previously the HRC had only prevented extradition/expulsion when it considered the circumstances or manner of execution to contradict ICCPR Article 7.[72]

In coming to the conclusion that extradition in such circumstances could violate Article 6, the HRC stated that: "[f]or countries that *have* abolished the death penalty, […] they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out."[73]

Similarly, the HRC has found that extradition/expulsion in circumstances where an individual is exposed to real risk of capital punishment in and of itself contravenes ICCPR Article 7 (thus without needing to argue that the manner of execution or conditions on death row constitutes Article 7-contrary treatment). This is reflected in *Yin Fong v Australia,* where the HRC stated it was aware of the stress and anxiety that would be caused for an individual exposed to the risk of capital punishment.[74] The HRC found that, in the event that Australia forcibly removed the author without adequate assurances, the risk of capital punishment alone constituted violation of the author's rights under Article 7,[75] (without discussion on the death row circumstances or methods of execution). In this case, the HRC also found that the Article 6 right to life would be violated in these circumstances.[76]

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[68] *Judge v Canada,* Human Rights Committee, Views adopted 5 August 2002, Communication No. 829/1998.
[69] *Ibid.,* para. 10.3.
[70] *Ibid.,* para. 10.4.
[71] *Ibid.,* para. 10.6. Note, since the HRC found violation of Article 6, they did not consider it necessary to address whether Article 7 had also been violated (see para. 10.10).
[72] *Supra.,* (note 1), Bharat Malkani, p. 533.
[73] *Supra.,* (note 68), *Judge v Canada,* para. 10.4.
[74] *Yin Fong v Australia,* Human Rights Committee, Views adopted 23 October 2009, Communication No. 1442/2005, para. 9.7.
[75] *Ibid.,* para 9.8.
[76] *Ibid.*

Thus, it is now accepted that ICCPR contracting States are prohibited from extraditing individuals where there is risk of being subjected to the death penalty; and to do so without death penalty assurances would contradict ICCPR Article 6 and/or Article 7. This position is emphasised in HRC General Comments. In General Comment 31, the HRC provides that:

> "[…] the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[77]

A more recent General Comment elaborates on this position. In General Comment 36, the HRC provides that: "The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated."[78] Furthermore, "[…] it would be contrary to article 6 to extradite an individual from a country that abolished the death penalty to a country in which he or she may face the death penalty."[79] Moreover:

> "States parties that abolished the death penalty cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained. In the same vein, the obligation not to reintroduce the death penalty for any specific crime requires States parties not to deport, extradite or otherwise transfer an individual to a country in which he or she is expected to stand trial for a capital offence, if the same offence does not carry the death penalty in the removing State, unless credible and effective assurances against exposing the individual to the death penalty have been obtained." [80]

Thus, it is clear that abolitionist States who are party to the ICCPR are prohibited from extraditing individuals to face the death penalty in foreign States. This prohibition is so for all ICCPR State parties who have abolished the death penalty, not only for those abolitionist

[77] General Comment No. 31, Human Rights Committee, *Nature of the General Legal Obligation Imposed on states Parties to the Covenant*, UN Doc. CCPR/C/21/Rev 1/Add.13, 29 March 2004, para. 12.
[78] *Supra.,* (note 47), General Comment No. 36, This position originally stated and confirmed by the HRC in *supra.,* (note 55), *Kindler v Canada,* paras. 13.1-13.2.
[79] *Ibid.,* (General Comment 36), para. 30. This position comes from HRC case law. See e.g. *Supra.,* (note 74), *Yin Fong v Australia*, para. 9.7. (italics in original).
[80] *Ibid.,* (General Comment 36), para. 34. See also *Supra.,* (note 68), *Judge v Canada*, para. 10.6.

States who have ratified ICCPR OP 2.[81] Extradition would only be permissible in such circumstances on obtaining assurances from the receiving State that the death penalty will not be imposed.[82]

2.3. Rationale Behind the Legal Obligation to Withhold Assistance in the Absence of Death Penalty Assurances

The scope and manner of the obligation not to extradite individuals to face execution "has ramifications for the argument that abolitionist States are obliged to refrain from assisting the use of the death penalty in other ways."[83] There are many parallels that can be drawn between the ECtHR and HRC's rationales to broaden their respective convention's protective ambits to cover extradition cases and the provision of MLA to foreign retentionist States in the context of this study. As extradition can even be argued to be a type of MLA,[84] it would seem logical that abolitionist States should thus also refuse the provision of MLA without death penalty assurances. This study respectfully submits that the UK Queen's Bench and the majority in the Supreme Court were incorrect in their findings in *Maha Elgizouli* that there is no human rights obligation requiring the UK to withhold provision of MLA where there is a risk that this would lead to imposition of the death penalty. "While States must be able to assist each other in the fight against crime, the prohibition and opposition of the death penalty is not something that can be set aside for the sake of convenience."[85]

[81] *Supra.,* (note 68), *Judge v Canada*, para. 10.6: "For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, *irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty*, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out." (italics added).
[82] *Supra.,* (note 74), *Yin Fong v Australia,* para. 9.7: "the Committee considers that an enforced return of the author to the Peoples' Republic of China, without adequate assurances, would constitute violations by Australia, as a State party which has abolished the death penalty, of the author's rights under article 6 and article 7 of the Covenant." (emphasis added).
[83] *Supra.,* (note 1), Bharat Malkani, p. 535.
[84] *United States v Burns*, Judgment of 15 February 2001, Supreme Court, Canada, SCR 283, para. 73.
[85] *Supra.,* (note 1), Bharat Malkani, p. 550.

2.3.1. The Underlying Principle of Non-Facilitation

In demonstrating that ECHR and ICCPR protection covers extradition cases, both the ECt and the HRC have relied on the principle of "non-facilitation" of the death penalty (and thus, similar to the concept of prohibition of complicity in convention-contrary conduct). This results from a clear conflict if States were permitted to be instrumental in the foreseeable human rights abuses of other States.[86]

In the ECHR context, one of the underlying rationales behind the ECtHR's decision to prohibit extradition in these circumstances is the reality that the contracting State would be facilitating the unacceptable outcome,[87] (i.e. facilitating the death penalty). This was first established in *Soering*, where the ECtHR held that "liability [under the ECHR] is incurred by the extraditing Contracting State by reason of its having taken action which has a direct consequence the exposure of an individual to proscribed ill-treatment."[88] This underlying principle has subsequently been reaffirmed and endorsed by the ECtHR in a number of cases,[89] and thus provided the rationale to broaden the protective ambit of the ECHR to prohibit extradition/expulsion from a contracting State to face the death penalty in a non-contracting State.

In another UK domestic case, *R (Ismail) v Secretary of State for the Home Department,*[90] the UK Supreme Court concluded that the decision in *Soering* was based on the fact of UK's facilitation of treatment contrary to ECHR Article 3 by the US: "It was because the actions of the UK authorities […] facilitated that outcome that a violation of article 3 was held to be

[86] Sarfaraz Ahmed Khan, "Extradition and Death Penalty: An Unresolved Dilemma in Abolitionist States", *SSRN Electronic Journal,* 2015, p. 9.
[87] The Queen's Bench in *Maha Elgizouli* accepted that the non-facilitation principle existed as the rationale to prohibit extradition in such circumstances, however, the Court did not accept that it could be extended to the provision of MLA, see *supra.,* (note 8) *Maha Elgizouli* (QB case), paras. 66, 55.
[88] *Supra.,* (note 51), *Soering v UK,* para. 91.
[89] See e.g. *Al-Saadoon and Mufdhi v UK*, *supra* (note 37), para. 134; *Saadi v Italy,* European Court of Human Rights, Judgment of 28 February 2008, Application No. 37201/06, para. 126; *Al-Adsani v the United Kingdom*, European Court of Human Rights, Judgment of 21 November 2001, Application No. 35763/97, para. 39.
[90] *R (Ismali) v Secretary of State for the Home Department,* Judgment of 6 July 2016, Supreme Court, United Kindgom, WLR 2814. Note – domestic cases do not provide significantly authoritative interpretations of international ECHR rights. This domestic case is thus used only to highlight the existence and validity of the principle of non-facilitation.

present. In effect, the UK would have been directly instrumental to exposing Soering to the risk of being executed."[91]

The HRC has used the same rationale in its cases regarding extradition to face death penalty. For example, in *Judge v Canada*, the HRC found that Canada had violated the author's right to life by extraditing him to the US to face the death penalty without obtaining requisite assurances: "The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada *established the crucial link in the causal chain* that would make possible the execution of the author."[92]

Another example from a national setting, which is relevant for this discussion, is a South African Constitutional Court Case, *Mohamed v President of the Republic of South Africa.*[93] In this case, the court looked at the causal connection to execution in extradition cases, and thus identified a principle of non-facilitation to justify refusing to extradite without appropriate death penalty assurances. The court stated that there was a "commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment".[94] The appellant used the language of the HRC in *Judge v Canada,* stating that what matters is whether the State has "established the crucial link in the chain that would make possible the execution of the author."[95]

Turning to the legal question of this study, the act of providing MLA for use in foreign criminal proceedings, where prosecution may result in judicial execution, clearly also has the direct consequence of exposing the individual in question to treatment prohibited for abolitionists States by the ECHR and the ICCPR. The action of the authorities who provide or authorise the provision of MLA facilitates an outcome that contravenes ECHR and ICCPR rights to life and rights to be free from torture or inhumane treatment, as provision of such assistance is "directly instrumental" to exposing the individual in question to the risk of capital punishment.

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[91] *Ibid.,* para. 35, Lord Kerr.
[92] *Supra.,* (note 68), *Judge v Canada*, para. 10.6. (italics added)
[93] *Mohammad and Another v President of the Republic of South Africa and Others,* Judgment of 28 May 2001, Constitutional Court of South Africa, 17/01 [2001] ZACC 18. Case also discussed by Lord Kerr in *Maha Elgizouli* SC case, *supra.,* (note 9), para. 145.
[94] *Ibid.,*(*Mohammad and Another v President of the Republic of South Africa and Others*), para. 59.
[95] *Supra.,* (note 68), *Judge v Canada,* para. 10.6.

As discussed in the minority judgment of Lord Kerr in the *Maha Elgizouli* Supreme Court case, there is a "fundamental illogicality of, on the one hand, refusing to extradite or deport individuals for trial in a foreign state where there was a risk of the imposition of the death penalty, without requisite assurances, and, on the other hand, facilitating such a trial when precisely the same outcome is in prospect without demanding assurances."[96] The irrationality of taking a different approach in these two very similar circumstances is also illustrated by Christof Heyns (a former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, and current member of the HRC):

> "A dilemma emerges when abolitionist states provide assistance to retentionist states in criminal matters and that assistance leads to the use of the death penalty. Even though the individual facing the death penalty in such cases may never have been in the jurisdiction of the abolitionist state, such assistance could amount to complicity in the death penalty. The same legal principles apply here as in the case of transfer of persons: states that have abolished capital punishment may not assist in bringing about the death penalty in other countries."[97]

Thus, such rationale that prohibits extradition to face the death penalty, should not logically be confined only to extradition cases. "[I]f it is objectionable to be complicit in exposing an individual to the risk of execution by extraditing him, it is surely equally objectionable to be complicit in facilitating that result by providing material which has the same result."[98]

2.3.2. Opposition to the Death Penalty in "All Circumstances": CoE and EU Member States

As discussed earlier, ECHR Protocol 13 abolished the death penalty "in all circumstances" for its State parties. No derogations or reservations can be made from the absolute prohibition.[99] The ECtHR's discussion of the nature and extent of ECHR Protocol 13 in the case *Alsaadoon v Mufhdi,* is relevant for the argument that the non-facilitation principle extends to death penalty as a consequence of the provision of MLA:

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[96] *Supra.,* (note 9), *Maha Elgizouli* (SC decision), Lord Kerr, para. 145(3). Note, once more, Lord Kerr was in the minority.
[97] Special Rapporteur on extradition, summary or arbitrary executions, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,* A/70/304, 7 August 2015, para. 102.
[98] *Supra.,* (note 9), *Maha Elgizouli* (SC decision), Minority judgment of Lord Kerr, para. 145(3).
[99] ECHR Article 13, Articles 2 and 3.

> "The court takes as its starting point the nature of the right not to be subjected to the death penalty. Judicial execution involves the deliberate and premeditated destruction of a human being by the state authorities. Whatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the state must inevitably give rise to intense psychological suffering. The fact that the imposition and use of the death penalty negates fundamental human rights has been recognised by the member states of the Council of Europe. In the preamble to Protocol No 13 the Contracting States describe themselves as 'convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings'"[100]

> "The court considers that, in respect of those states which are bound by it, the right under article 1 of Protocol No 13 not to be subjected to the death penalty, which admits of no derogation and applies in all circumstances, ranks along with the rights in articles 2 and 3 as a fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed."[101]

The ECtHR's discussion outlined above recognises the comprehensive reach of ECHR Protocol 13, whereby it applies in all circumstances, and no derogations or reservations are permitted. Furthermore, the passage frames the prohibition of death penalty as a fundamental right (classing it alongside ECHR Articles 2 and 3). ECtHR jurisprudence and ECHR Protocol 13 demonstrate "the almost complete ubiquity of opposition in the countries which compromise the Council of Europe to the imposition of the death penalty in any circumstances".[102] Furthermore, as noted earlier, the EU can also be argued to unmistakably oppose the death penalty in every circumstance.[103]

The argument that the EU and CoE are strongly opposed to judicial execution, including indirect application of the death penalty, is supported by a Joint Declaration of the EU and CoE in 2018, which provides that:

> "On the European and World Day against the Death Penalty, the Council of Europe and the European Union (EU) reiterate their strong opposition to capital punishment in all circumstances and for all cases. The death penalty is an affront to human dignity. It constitutes cruel, inhuman and degrading treatment and is contrary to the right to life. The death penalty has no established deterrent effect and it makes judicial errors irreversible […] Member states should continue taking effective measures to

[100] *Supra.,* (note 37), *Alsaadoon v Mufhdi,* para. 115.
[101] *Ibid.,* para. 118.
[102] *Supra.,* (note 9), *Maha Elgizouli* (SC decision), Lord Kerr, para. 116.
[103] See subheading 2.1. above.

> prevent their involvement, however indirect, in the use of the death penalty by third countries, such as by adopting measures that prevent the trade in goods that could subsequently be used to carry out executions […]"[104]

Thus, the CoE and EU Member State abhorrence to the death penalty, accompanied by the prohibition on facilitating death penalty through extradition, significantly support the argument that facilitating the same sentence through the provision MLA should also be prohibited for Member States of the CoE and the EU.

2.3.3. Prohibition of Reintroduction of the Death Penalty

Looking primarily at the ICCPR context, ICCPR OP 2 (like the ICCPR itself) "does not contain termination provisions and States parties cannot denounce it."[105] Thus, abolition of the death penalty cannot legally be revoked, and the death penalty may not be reintroduced.[106] As provided by the HRC in General Comment 36:

> "[t]he obligation not to reintroduce the death penalty for any specific crime requires States parties not to deport, extradite or otherwise transfer an individual to a country in which he or she is expected to stand trial for a capital offence, if the same offence does not carry the death penalty in the removing State, unless credible and effective assurances against exposing the individual to the death penalty have been obtained."[107]

The facilitation of the death penalty in foreign States by abolitionist States in some respects reintroduces the abolished sentence for that State. In the ICCPR context, this rationale was used to argue for the prohibition extradition to face the death penalty. For example, in a minority judgment in the case *Cox v Canada*,[108] (which was decided before ICCPR law developed to prohibit extradition to face the death penalty), the committee member argued that extradition would violate Article 7:

> "The argument was based on the presumption that abolitionist states are under obligation to ensure that the scope of the death penalty is not enlarged or

[104] EU High Representative for Foreign Affairs and Security Policy and the Secretary General of the Council of Europe, *Joint Declaration on the European and World Day against the Death Penalty*, published 9 October 2018.
[105] *Supra.,* (note 47), General Comment 36, para. 34.
[106] *Ibid.*
[107] *Ibid.*
[108] *Cox v Canada,* Human Rights Committee, Views adopted 31 October 1994, Communication No. 539/1993.

> reintroduced. The obligation extends to indirect reintroduction – through extradition, expulsion or compulsory return, in such a way that an individual […] may be exposed to capital punishment in another state."[109]

Thus, a similar argument can be forwarded for the topic of this study. The provision of MLA in circumstances that may result in judicial execution enlarges the scope of the death penalty, effectively reintroducing it for the assistance-sending State, despite the irrevocable undertaking to prohibit and not reintroduce the death penalty.

2.3.4. Evolutive Interpretation of the ECHR and the ICCPR

2.3.4.1. Object and Purpose

In justification of the expansion of ECHR protection to establish State party jurisdiction in extradition cases, the ECtHR has relied on interpreting the ECHR in light of its object and purpose. The ECtHR has expanded the protective ambit of the ECHR in this way in the context of other rights also, relying on a purposive construction of ECHR rights. In *Soering,* the ECtHR stated that "It would hardly be compatible with the underlying values of the Convention […] were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances […] would plainly be contrary to the spirit and intendement of the [ECHR]".[110]

This is so in the ICCPR context also. The object and purpose of the ICCPR is reflected in the text of the convention, as an instrument for the protection and recognition of human rights: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […]"[111] The HRC has also expanded protection to cover extradition cases, relying on the object and purpose of the ICCPR: "[The HRC] is moving towards strengthening the obligations of abolitionist states and, in so doing, restricting the availability

[109] *Supra.,* (note 46), Amrita Mukherjee, p. 515.
[110] *Supra.,* (note 51), *Soering v UK,* para. 88.
[111] ICCPR, Article 2(1).

of the sanction [of the death penalty] for retentionist states. This is consistent with the object and purposes approach."[112]

Such reasoning is also valid for the provision of MLA in the circumstances of this study. It would be equally inconsistent with the object and purpose of the ECHR and the ICCPR were abolitionist States permitted to provide MLA for use in criminal proceedings where prosecution may result in death penalty, when the death penalty is prohibited for those States. It would thus contravene the underlying values of the conventions if abolitionist State parties were permitted to facilitate death penalty in foreign States in this manner. Provision of MLA in these circumstances would "plainly be contrary to the spirit and intendenment"[113] of the ECHR and ICCPR (and their death penalty prohibiting additional protocols).

2.3.4.2. Convention Rights to be Practical and Effective

From early on, the ECtHR has also emphasised the requirement that ECHR rights be "practical and effective" as opposed to "theoretical an illusory". [114] This reasoning was also used by the ECtHR in its' expansion of the ECHR's extraterritorial applicability in extradition cases. In *Soering,* the ECtHR provided that: "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective."[115] The ECHR is an instrument intended to be protect rights in a practical and effective manner. Prohibition of extradition to face the death penalty was thus required, to ensure that the safeguards codified in the ECHR were effective, not merely theoretical.

The HRC has also highlighted the need for the practical and effective enjoyment of ICCPR rights, using the same wording as that used by the ECtHR. For example, the case *Kennedy v Trinidad and Tobago* concerned, among other matters, the right of any one sentenced to death to seek pardon (within the Article 6 right to life).[116] The HRC stated that: "the right to

[112] *Supra.,* (note 46), Amrita Mukherjee, p. 507.
[113] *Supra.,* (note 51), *Soering v UK,* para. 88
[114] *Airey v Ireland*, European Court of Human Rights, Judgment of 9 October 1979, Application No. 6289/73, para 24.
[115] *Supra.,* (note 51), *Soering v UK,* para. 87.
[116] ICCPR, Article 6(4).

apply for mercy under article 6, paragraph 4, must be interpreted to be an effective right, i.e. it must be construed in such a way that it is practical and effective rather than theoretical or illusory."[117] Thus, the ICCPR also obliges States to "ensure the *effective and practical* enjoyment of ICCPR rights."[118]

Turning to the question of the present study, in order for the right to life and the right to be free from torture or inhuman and degrading treatment or punishment to be "practical and effective", State party facilitation of judicial execution (by way of provision of MLA in foreign criminal proceedings) must, surely, be prohibited by the ECHR and the ICCPR. If provision of MLA under such circumstances were permissible, it would render aspects of ECHR and ICCPR safeguards ineffective and illusory.

2.3.4.3. Living Instruments

Furthermore, the development of the ECHR and ICCPR prohibition of extradition to face the death penalty is an example of how both conventions are "living instruments". The HRC and the ECtHR have widened the scope of their respective conventions to cover subject matter that was not in the mind of the drafters, to reflect and respond to society's contemporary views and needs. This is because these conventions are living instruments and need to be "interpreted in light of present-day conditions".[119]

This doctrine has been used in the context of extradition to face convention-contrary treatment. For example, in the aforementioned case, *Judge v Canada,* the HRC looked at the practice of its State parties (of seeking assurances before extraditing individuals to face capital charges): "[o]ther abolitionist countries do not, in general, extradite without

[117] *Kennedy v Trinidad and Tobago,* Human Rights Committee, Views adopted 26 March 2002, Communication No. 845/1998, para. 3.7.
[118] Jeremy Farral and Kim Rubestein, *Sanctions, Accountability and Governance in a Globalised World*, Cambridge University Press, 2009, p. 386. (italics added).
[119] First discussed in ECHR context in *Tyrer v the United Kingdom,* European Court of Human Rights, Judgment of 25 April 1978, Application No, 5856/72., para. 31. For ICCPR, see also *supra.,* (note 46), Amrita Mukherjee, e.g. at p. 507: "[The HRC] is moving towards strengthening the obligations of abolitionist states and, in so doing, restricting the availability of the sanction for retentionist states. This is consistent with […] the nature of the ICCPR *as a living instrument*." (italics added)

assurances."[120] The HRC then came to the conclusion that Canada had violated the author's right to life by extraditing him to the US to face the death penalty without obtaining requisite assurances, as the ICCPR had developed to reflect this legal reality: "The Committee considers that the Covenant should be interpreted as a *living instrument* and the rights protected under it should be applied in context and in the light of present–day conditions."[121]

This "living instrument" doctrine can be applied to the circumstances of the present study. In doing so, the following statement by Lord Kerr in the Supreme Court judgment of *Maha Elgizouli* is relevant:

> "Law, [...] if it is operating as it should, must be responsive to society's contemporary needs, standards and values. It is a commonplace that these are in a state of constant change. […] I am convinced that the adjustment to the common law which I propose [prohibiting the provision of MLA for proceedings which may result in death penalty] reflects the contemporary standards and values of our society."[122]

This study strongly agrees with Lord Kerr's statement above. Obliging States to withhold MLA in the absence of adequate death penalty assurances reflects the contemporary needs, standards and values of present day society (evidenced, for example, by the aforementioned parallels between providing MLA and the prohibition of extradition to face the death penalty, and, especially for the European context, the opposition of the CoE and EU to the death penalty). This study submits that the evolution of the ECHR and the ICCPR to prohibit abolitionist States from providing such assistance without requisite assurances is merely an incremental step, and is inline with the status of both conventions as living instruments.

2.4. ICCPR and ECHR State Parties

As asserted in this chapter, the ICCPR and the ECHR may impose an obligation on abolitionist States to seek assurances that the death penalty will not be imposed before providing MLA for use in foreign criminal proceedings which may result in death penalty, and an obligation to withhold such assistance in the absence of adequate assurances. With respect to which States such an obligation effects, as outlined in this chapter, it is likely that

[120] *Supra.,* (note 68), *Judge v Canada,* para. 10.3.
[121] *Ibid.,* (italics added).
[122] *Supra.,* (note 9), *Maha Elgizouli* (SC decision), Lord Kerr minority judgment, para. 144.

the law within the CoE human rights framework (i.e. through the ECHR) has developed so as to prohibit the death penalty for its member States in all circumstances,[123] and that the ECHR now prohibits all contracting States from extraditing or expelling individuals to face the death penalty in retentionist States.[124] Thus, the obligation to withhold assistance in the absence of death penalty assurances in the context of this study, would similarly apply to all ECHR contracting States.[125]

For non-European/non-ECHR contracting States, those abolitionist States who have ratified the ICCPR would also be under a legal obligation to withhold MLA in the absence of requisite assurances in the context of this study. As with extradition, this obligation would be so for all ICCPR State parties who have abolished the death penalty, not only for those abolitionist States who have ratified ICCPR OP 2.[126]

States not party to ECHR or ICCPR, or ICCPR State parties who have not abolished the death penalty, would not be impacted by such international obligations stemming from these instruments.[127] For those abolitionist States party to both the ICCPR and the ECHR, the more desirable complaints mechanism to bring such a case is the ECtHR. The ECtHR is a judicial body that provides legally binding judgements,[128] whereas the HRC is quasi-judicial, whereby its Views are recommendatory in nature (although still very authoritative).[129]

[123] *Supra.,* (note 37), *Al-Saadoon and Mufdhi v UK,* para. 120.
[124] *Ibid.*
[125] And thus, all CoE member States (as ratification of ECHR is a pre-requisite for CoE membership). Council of Europe website, "A Convention to protect your rights and liberties", available at https://www.coe.int/en/web/human-rights-convention, (last visited 31 March 2020).
[126] *Supra.,* (note 68) *Judge v Canada*, para. 10.6: "For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, *irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty*, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out." (italics added).
[127] These States may, however, have similar obligations stemming from other instruments or domestic law. This study does not analyse such potential obligations.
[128] ECHR, Article 46.
[129] See General Comment No. 33, Human Rights Committee, *The Obligations on State Parties under the Optional Protocol to the International Covenant on Civil and Political Rights,* UN Doc. CCPR/C/GC/33, 5 November 2008, para. 11: "While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions."

3. The Issue of Jurisdiction

Contracting States have a jurisdictionally qualified obligation to provide and protect the human rights codified in the ECHR and the ICCPR (i.e. the engagement undertaken by each State is confined to ensuring and protecting rights of those individuals within the State's jurisdiction).[130] The provision of MLA in foreign criminal proceedings thus raises potentially difficult questions relating to jurisdiction, as the individual in question (who may be facing the death penalty) is not, and perhaps never was, in the territorial jurisdiction of the assistance-providing State.

It is worth underscoring here, that the general rule is that 'aliens' are subject to the jurisdiction of the host state.[131] Thus, States exercising jurisdiction beyond their own territorial borders into another State's territorial jurisdiction can actually be argued to interfere with the exclusive territorial jurisdiction of the host State.[132] However, the territorial jurisdiction of the host State is somewhat moderated by human rights obligations of other States, to the extent that they extend beyond national borders. Thus, in the context of this study, in order to establish a duty on States to seek assurances, and withhold assistance in the absence of assurances, it must be established that State parties to the ECHR and the ICCPR owe, to some degree, extraterritorial obligations to the individuals to whom the foreign criminal proceedings concern. This is a question of jurisdiction.

An argument forwarded by Lorraine Finlay (regarding provision of MLA by Australia in potential death penalty cases) discusses the phrase "within the jurisdiction" of a State party, in reference to ICCPR OP 2. She exemplifies how jurisdiction may present an obstacle for the conclusions presented in the previous Chapter: "The wording of this article places a clear and unambiguous jurisdictional limitation on the nature of the obligation. The article does *not* impose an obligation on States not to expose a person to the real risk of the application of the

[130] See ECHR Article 1, ICCPR Article 2(1).
[131] Kay Hailbronner and Jana Gogolin, "Aliens", *Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2013; Francesca Capone, "The children (and wives) of foreign ISIS fighters: Which obligations upon the states of nationality?", in *Questions of International Law Journal,* Vol. 60, pp. 69-97, p. 90.
[132] *Ibid.,* Francesca Capone, pp. 69-97, p. 90.

death penalty. Rather, the language expressly limits the obligation to the abolition of the death penalty within the State's own jurisdiction."[133]

3.1. The Difference Between Extradition and MLA in Terms of Jurisdiction

Although extradition to face the death penalty, and the provision of MLA for proceedings that may result in death penalty, have many obvious similarities (including the fact that both may facilitate judicial execution in a foreign state), they are not identical fact scenarios from a jurisdictional standpoint.

Regarding extradition, the individual is, at least originally, within the territorial jurisdiction of the contracting State. The presence of the individual within the territory of the contracting State means that an extraditing State has jurisdiction over the individual in question, owing to the obvious link between the contracting State's physical territory and the individual whose rights are in question. Thus, "[j]urisdiction extends in these [extradition] cases […] because the wrongful act […] is directly connected to the individual's territorial presence in a signatory state",[134] and thus the State is responsible for the conditions on which it forces the individual to exit its borders.[135]

This connection between the physical territory of the State party and extraterritorial jurisdiction in extradition cases is especially exemplified in pre-extradition/expulsion cases,[136] as the individual is at all times within the contracting State's physical territory, and the harm prospective.[137] In reactive cases (where the contracting State has already expelled or extradited the individual), the jurisdictional responsibility under Article 1 is incurred upon the State party's termination of territorial ties with the individual (which facilitates the ensuing ECHR-contrary action).[138] Thus, in both circumstances, the connection to the

[133] Lorraine Finlay, "Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia, in *Sydney Law Review*, vol. 95, 2011, p. 109. (italics in original)
[134] Sarah Miller, "Revisiting extraterritorial jurisdiction: a territorial justification for extraterritorial jurisdiction", in *European Journal of International Law*, Vol. 20(4), pp. 1123-1246, 2009, p. 1242.
[135] *Ibid.*
[136] E.g. *Chahal v the United Kingdom,* European Court of Human Rights, Judgment of 15 November 1996, Application No. 22414/93.
[137] *Supra.,* (note 134), Sarah Miller, p. 1243.
[138] *Ibid.,* p. 1243.

physical territory of the contracting party is clear, whereby it can be argued that "the extraterritorial acts are so foreseeably and inextricably linked to the individual's [current or former] presence in the state's territory that they become within the state's jurisdiction."[139]

Conversely, regarding the provision of MLA for use in foreign criminal proceedings that may result in death penalty, the individual to whom the criminal investigation and proceeding concerns may have never stepped within the State party's territorial borders. The potential for absence of any past, present or future territorial ties with the MLA-providing State is a distinction between extradition and provision of MLA, which may make it more difficult to establish State party jurisdiction for the individual, when the adverse consequence is suffered outside its borders.

The UK Queen's Bench used similar arguments when they dismissed the claim in *Maha Elgizouli*.[140] The Queen's Bench found that the extension of jurisdiction (and of the non-facilitation principle)[141] to the provision of MLA under the circumstances of the case "is not […] a small step, but an extension of a large moment which has not been recognised […] anywhere."[142] The Queen's Bench stated that: "the claimant's son is presently held in Syria, outside the jurisdiction of this court", "the ECHR has no direct application to him", and jurisdiction of the ECHR does not "stretch as far" as the individual to which the criminal proceedings concern.[143]

3.2. Extraterritorial Jurisdiction of the ECHR and the ICCPR

The ECHR and the ICCPR do have extraterritorial reach, to some degree. However, "the extent to which State parties owe their human rights obligations abroad remains uncertain."[144] Extensive case law and academic literature demonstrates that there is an ever-increasing extraterritorial scope under human rights conventions.[145]

[139] *Ibid.*, p. 1246.
[140] Note, on appeal, the Supreme Court was silent as to the matter of jurisdiction. See *supra.,* (note 9), *Maha Elgizouli* (SC decision).
[141] Principle of non-facilitation of the death penalty, as assessed in Chapter 2.
[142] *Supra.,* (note 8), *Maha Elgizouli* (QB decision), para. 66.
[143] *Ibid.,* para. 55.
[144] *Supra.,* (note 131), Fransesca Capone, p. 89.
[145] *Supra.,* (note 1), Bharat Malkani, p. 553.

As noted in *Soering v the UK,* the ECHR "does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States".[146] Despite this, it is clear that jurisdiction in the ECHR is no longer considered to simply be a territorial notion.[147] The ECHR has extraterritorial reach, principally in two main categories: 1) circumstances where the State exerts effective control over an area outside its territory;[148] and 2) circumstances where State agent(s) exercise power and control over an individual(s) (whereby the individual(s) thus falls within the jurisdiction of the State).[149] As noted in *Alskeini v UK,*[150] this includes the important exception to territorial jurisdiction – that a State has jurisdiction for acts committed extraterritorially, when it exercises "public powers" on the territory of another State.[151] As stated by Bharat Malkani, "[t]his illustrates a growing concern among the judiciary about the extraterritorial abuse of Convention rights."[152]

Turning to the ICCPR, similarly, the HRC "has long given extraterritorial effect to the ICCPR."[153] The most comprehensive statement of the extraterritorial reach of the ICCPR by the HRC was in its General Comment 31, where the HRC interpreted the obligation in Article 2(1) as obliging State parties to "secure the rights under the Covenant for all persons in their territory and all persons under their control."[154] The HRC went on to observe that a contracting party's duty to respect, protect and ensure rights to all persons subject to the State's jurisdiction includes "anyone within the power or effective control of the State Party, even if not situated in the territory of the State Party […]. This Principle also applies to those within the power or effective control of the forces of the State Party acting outside its territory, regardless of the circumstances in which such power or effective control was

[146] *Supra.,* (note 51), *Soering v UK*, para. 86.
[147] See e.g. *Al Skeini and Others v the United Kingdom,* European Court of Human Rights, Judgment of 7 July 2011, Application No. 55721/07.
[148] See e.g. *Cyprus v Turkey*, European Court of Human Rights, Judgment of 10 May 2001, Application No. 25781/94.
[149] See e.g. *Hassan v the United Kingdom,* Judgment of 16 September 2014, Application No. 29750/09.
[150] *Supra.,* (note 147), *Al Skeini and Others v the United Kingdom,* Note, this case added considerable clarity to the issue of extraterritorial jurisdiction, e.g. classifying the headings noted in this paragraph, and what they contained.
[151] *Ibid.* See also *supra.,* (note 66), *Bernadette Rainey, Elizabeth Wicks and Clare Ovey,* p. 93; and *supra.,* (note 1), Bharat Malkani, p 554.
[152] *Supra.,* (note 1), Bharat Malkani, p. 554.
[153] Robert Goldman, "Extraterritorial application of the rights to life and personal liberty including habeas corpus, during situations of armed conflict", in Larissa Van Den Herik and Nico Schrijver (eds.) *Counter-terrorism strategies in a fragmented legal order: meeting the challenges*, Cambridge University Press, pp. 454-481, 2013, p. 457.
[154] *Supra.,* (note 77), General Comment No. 31, para. 12.

obtained".[155] The International Court of Justice ("ICJ") confirms this position in an Advisory Opinion of 2004,[156] in which the ICJ rejected the argument that the ICCPR was not applicable outside a contracting State's territorial boundary.[157] The ICJ stated that the ICCPR's reach extends to "acts done by a State in the exercise of its jurisdiction outside its own territory".[158]

3.3. Rationale to Draw Jurisdictional Link in This Context

This study submits that, while the human rights framework analysed does not provide a straightforward jurisdictional link, it may be that existing categories of extraterritorial jurisdiction in the ICCPR and ECHR can be further defined to include the context of this study.

3.3.1. The Decision to Provide Assistance Occurs Within the State's Territorial Jurisdiction

As outlined above, human rights obligations codified in the ICCPR and the ECHR can extend, to some extent, beyond the State party's territorial borders. However, as yet, neither the ECtHR or HRC have analysed if the jurisdictional requirement can be satisfied in cases concerning the provision of MLA in criminal proceedings that may result in judicial execution, i.e. whether such circumstances "can be construed as the exercise of 'public powers' as per the ECHR, or whether the person at risk of the death penalty in these types of cases can be deemed to be 'within the power or effective control' of the abolitionist State as per the ICCPR."[159]

It can be argued that, in the circumstances of this study, the requirement of jurisdiction is satisfied as the *act that leads to the wrong* (i.e. the act of providing MLA without death

[155] *Ibid.,* para. 10.
[156] *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of the International Court of Justice, ICJ Rep 136, 9 July 2004.
[157] *Supra.,* (note 153), Robert Goldman, p. 458.
[158] *Supra.,* (note 156), ICJ Advisory Opinion, para. 111.
[159] *Supra.,* (note 1), Bharat Malkani, p. 554.

penalty assurances (and the act of deciding to do so)) occurs within the territory and effective control of the abolitionist State.[160] Extradition cases are again of use for such an argument. As stated in the textbook *Jacobs, White, and Ovey: The European Convention on Human Rights*, in extradition cases under the ECHR, "liability under the Convention arises from the *decision* to remove the person concerned from the territory of the Contracting State and expose him to a risk of ill-treatment in the receiving country. The Contracting State is not liable for what actually befalls the applicant once out of its territory […], but instead for making the *decision* to expel him knowing that there was such a risk."[161] Similarly, the argument could be forwarded here, that liability under the ECHR occurs at the point of the *decision* (which is made in the abolitionist State's physical territory) to provide MLA without requisite assurances, which thus exposes the person concerned to a risk of ill treatment in the assistance-receiving State. However, as discussed in paragraph 3.1. above, there are factual differences between extradition and provision of MLA which may be fatal to such an argument (notably, the presence of the individual concerned in the territorial jurisdiction of the abolitionist State).

3.3.2. Individual is within "the Power and Control" of the Abolitionist State, and the Abolitionist State is Exercising "Public Powers"

However, there is definitely room to argue that in cases such as *Maha Elgizouli,* the State is exercising power and control over the individual concerned, despite the individual not being present in the State's territorial borders, thus bringing the individual in question under the jurisdiction of the abolitionist State. In the fact scenario of *Maha Elgizouli*, Mr El Sheikh (to whom the proceedings concern) was a British citizen until the UK recently stripped him of his citizenship. The UK has expressed desire to try him in its own territory, however, the UK's Crown Prosecution Service had determined that the evidence available was insufficient to warrant charging him in its territory.[162] As the UK considered it infeasible to prosecute him in the UK, it decided to support prosecution of El Sheikh in the US instead: "the clear view of the UK officials was that a prosecution of Mr El Sheikh in the US federal court

[160] *Ibid.,* pp. 533-534.
[161] *Supra.,* (note 66), *Bernadette Rainey, Elizabeth Wicks and Clare Ovey,* p. 90. (italics added).
[162] *Supra.,* (note 9), *Maha Elgizouli* (SC decision), para. 32. Note, feasibility of trying him in the UK may be revisited in the future (para. 32).

system, which included the UK evidence, represented the only realistic prospect of securing justice".[163] This is despite the US being rather reluctant to take responsibility for the trial, where the US "considered that the UK ought to set an example to the wider international community by accepting responsibility for bringing foreign terrorist fighters such as Mr El Sheikh […] to trial."[164] Any prosecution of El Sheikh in the US "depends critically on the evidence which has been obtained by the British authorities".[165]

This fact scenario shows an undeniable link between Mr El Sheikh and the UK. The US is, more or less, trying El Sheikh on the UK's behalf, as the evidence available was considered insufficient to try him within the UK domestic judicial system. Furthermore, the trial depends significantly on UK evidence, whereby the absence of UK's evidence renders prosecution in the US is unlikely to succeed. In these circumstances, it is a flagrant denial of fact to claim that El Sheikh, and the consequence of death penalty that may befall him, are not inextricably connected to the UK. The UK is exercising public powers in the US through this case, and exercising power and control over El Sheikh. As stated in *Al-Skeini,* "What is decisive in such cases is the exercise of […] power and control over the person in question."[166] The power and control that the UK is exercising over El Sheik thus provides sound argument for drawing a jurisdiction link. Such an argument is supported by the fact that the UK Supreme Court raised no jurisdictional arguments in the case (while in the Queen's Bench decision, jurisdiction was a significant factor for denying the applicability of ECHR obligations).[167]

As stated by Robert Currie, in such cases "[i]t is arguable that the provision of MLA by the requested State is an act of authority producing effects extraterritorially. The authorities are certainly exercising jurisdiction over the essential legal interests of the person regardless of their physical location."[168] While a specific jurisdictional conclusion to this effect is yet to be drawn by the ECtHR or the HRC, this study submits that this is because such a case has not appeared before either body. As stated in *Jacobs, White, and Ovey: The European*

[163] *Ibid.,* para. 33.
[164] *Ibid.*
[165] *Ibid.*
[166] *Supra.,* (note 147), *Alskeini v UK*, para. 136.
[167] See *supra.,* (note 9), *Maha Elgizouli* (SC decision). Note, even Lord Kerr's judgment in favour of broadening the principle of non-facilitation to provision of MLA was silent as to jurisdiction, suggesting that jurisdiction presented no obstacle in his reasoning.
[168] *Supra.,* (note 3), Robert Currie, (page number unknown – no page numbers provided in SSRN version of text download).

Convention on Human Rights, "still further development of the definition of jurisdiction will be necessary in future cases, particularly given the ever increasing involvement in Contracting States in conflicts beyond there territorial borders."[169]

3.3.3. Jurisdictional Limits Need Not Be Determinative

It can also be argued that "the developing law on the scope of extraterritorial obligations under human rights treaties suggests that the issue of jurisdictional limits need not be determinative of the scope of abolitionist States' secondary obligations to refrain from facilitating the use of the death penalty elsewhere."[170] This is exemplified by Robert Currie in his discussion on one State providing evidence to another for use in an unfair trial: "To provide evidence for use in a foreign criminal procedure that amounts to a "flagrant denial" of fair trial rights, simply on the basis that "our human rights obligations don't cover the accused," may render the requested State complicit in conduct which it has agreed to prohibit, necessarily leaving a bad taste from a legal and moral standpoint."[171]

The same argument can be forwarded in the context of this study also – where an abolitionist State is knowingly facilitating conduct that it has legally bound itself to abstain from (i.e. the death penalty), and chooses not to take steps to prevent it merely because of a jurisdictional technicality, this leaves a questionable aftertaste.[172] Through the provision of MLA, the assisting-State is participating in an invasive form of interaction between State and individual, directly impacting the person's legal interests.[173] As such, the State should act in accordance with its own human rights obligations, and not dispose of such obligations on a mere technicality.

[169] *Supra.,* (note 66), *Bernadette Rainey, Elizabeth Wicks and Clare Ovey,* p. 96.
[170] *Supra.,* (note 1), Bharat Malkani, p. 555.
[171] *Supra.,* (note 3), Robert Currie, (page number unknown – no page numbers provided in SSRN version of text download). Also quoted in *supra.,* (note 1), Bharat Malkani, p. 555.
[172] *Supra.,* (note 1), Bharat Malkani, p. 555.
[173] *Supra.,* (note 3), Robert Currie. (page number unknown – no page numbers provided in SSRN version of text download).

4. State Responsibility for Internationally Wrongful Acts

The law on state responsibility is outlined in the International Law Commission's ("ILC") Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles" / "Articles on State Responsibility").[174] This is another requirement which needs to be convincingly argued in order to establish abolitionist State responsibility for providing MLA to death penalty retentionist States for use in criminal proceedings that may result in the death penalty.[175]

As referred to in "Method and Material"[176] and "Limitations",[177] the legal status of the Articles on State Responsibility is unresolved in the legal community. While this thesis will not delve into discussion regarding the legal status of the ILC Articles, the position adopted in this study is that they are highly authoritative in nature, and evidence of a source of law.

4.1. Abolitionist State Responsibility for an Internationally Wrongful Act

Article 1 of the ILC Articles concisely provides that, "Every internationally wrongful act of a State entails the international responsibility of that State".[178] Article 2 goes on to define the conditions required to establish the existence of an internationally wrongful act, that being: 1) the conduct (consisting of an action or omission) must be attributable to the State under international law; and 2) for responsibility to be established, the conduct must constitute a

[174] The Articles on State Responsibility ("ILC Articles") are annexed to Resolution 56/83, adopted by the United Nations General Assembly, A/RES/56/83, *Responsibility of States for internationally wrongful acts*, 12 December 2001; The ICL's Articles themselves: International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts,* in Report of the International Law Commission on the Work of Its Fifty-third Session, UN Doc. A/56/10, 2001/283 (herein "ILC Articles" / "Articles on State Responsibility"); For the final text with commentary and apparatus, see *supra.,* (note 25), James Crawford.

[175] Note, however, that the ECtHR and the HRC frequently fail to mention the ILC Articles in their jurisprudence, often following their own rules regarding the responsibility of States (even though the ILC Articles should be relevant for their decisions). This will not be further discussed in the present study, but for further discussion, see e.g. Malgosia Fitzmaurice and Dan Sarooshi, *Issues of State Responsibility before International Judicial Institutions: The Clifford Chance Lectures,* Bloomsbury Publishing, 2004, p. 167: "The ILC Articles are virtually never explicitly mentioned in HRC discussions or for that matter in those of other human rights treaty organs." For ECtHR specifically, see e.g. James Crawford and Amelia Keene, "The Structure of State Responsibility under the European Convention on Human Rights", in Anne van Aaaken and Iulia Motoc (Eds.), *The European Convention on Human Rights and General International Law,* pp. 178-197, Oxford Scholarship Online, 2018.

[176] See "Methods and Material", subheading 1.3. of this study.

[177] See "Limitations", subheading 1.4. of this study.

[178] ILC Articles on State Responsibility, Article 1.

breach of an international obligation of the State.[179] "[B]oth elements are equally necessary for the attachment of concrete consequences of responsibility."[180]

4.1.1. Attribution

As referred to above, for conduct to be characterised as an "internationally wrongful act", it must first be attributable to the State in question.[181] While States are legal persons with authority to act under international law,[182] the elementary fact is that States have no physical existence, and thus can only act through person(s) whose conduct is performed on the States behalf: [183] "States can act only by and through their agents and representatives." [184] Actions/omissions of persons acting on behalf of the State are attributable to the State, and thus considered to be actions of the State itself.

In the ILC Articles, Chapter II of Part 1 deals with the question of attribution. Article 4 provides that conduct of any State organ shall be considered an act of the State (whether exercising legislative, executive, judicial or any other functions), and an organ includes any person/entity that has status in accordance with the State's internal law.[185] International lawyers and academics disagree on precisely who is a State agent for attribution purposes, but they do agree that a State must have substantial control over an individual in order for the person to be considered the State's agent.[186]

Decisions to provide MLA are clearly attributable to the State, as the persons making decisions to provide MLA are linked to the State's executive government, as public State entities. For example, in the aforementioned case, *Maha Elgizouli,* the UK Home Secretary

[179] ILC Articles on State Responsibility, Article 2(a)-(b).
[180] *Supra.,* (note 21), Robert Kolb, p. 34.
[181] ILC Articles on State Responsibility, Article 2(a). See also ILC Commentary on Article 2 – International Law Commission, *Commentary to Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN Doc. A/56/10, 2001/283, para. 5 (herein "ILC Commentary"). See also *Supra.,* (note 25), James Crawford, p. 82.
[182] ILC Commentary on Article 2, para. 5. See also, *Supra.,* (note 25), James Crawford, p. 82.
[183] *Supra.,* (note 21), Robert Kolb, p. 70.
[184] Questions relating to settlers of German origin in Poland, Advisory Opinion of the International Court of Justice, P.C.I.J., Series B, no. 6, 1923, p. 22.
[185] ILC Articles on State Responsibility, Article 4(1)-(2).
[186] Monica Hakimi, "State bystander responsibility", *The European Journal of International Law,* vol. 21(2), pp. 341-385, 2010, p. 356.

(a Cabinet Minister for the UK government), authorised provision of MLA to the US. While the specific governmental entity in charge of making MLA decisions may vary between States, the decisions always come from governmental offices and agents. Thus, it can be clearly established that any decision making act connected provision of MLA is attributable to the State under international law, thus satisfying Article 2(a) of the ILC Articles.

4.1.2. Breach of an International Obligation

As noted above, the second requirement for the existence of an internationally wrongful act is that the conduct attributable to the State constitutes a breach of an international obligation of the State.[187] What is required is discrepancy between a normative obligation on the one hand, and the actual conduct on the other: "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[188] "[R]egardless of its origin or character" refers to the applicability of all international legal obligations of States: "[i]nternational obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order."[189] A relevant primary obligation incumbent on the State must therefore be established, and then it must be shown that the State's actual conduct did not conform to what was legally required of it.

Regarding the provision of MLA, the question then turns to the topic of Chapter 2, i.e. whether there exists a legal obligation on abolitionist States to obtain death penalty assurances before the State provides MLA for use in a foreign criminal proceeding that may result in death penalty, and/or an obligation to withhold MLA in the absence of such assurances. As conduct proscribed by an international obligation may involve acts and omissions,[190] or a combination of acts and omissions, the specific formulation as a positive obligation to obtain assurances, or a negative obligation to refrain from providing MLA in the absence of assurances, is immaterial.

[187] ILC Articles on State Responsibility, Article 2(b).
[188] ILC Articles on State Responsibility, Article 12.
[189] ILC Commentary on Article 12, para. 3. See also *supra.,* (note 25); James Crawford, p.126.
[190] ILC Articles on State Responsibility, Article 2.

As established in the preceding chapters, the legal obligation discussed would require abolitionist States to do more than merely refrain from imposing the death penalty. Rather, there would also exist a legal obligation not to facilitate the use of the death penalty in foreign States through the provision of MLA in such circumstances. Chapter 2 of this study concluded that such an obligation can, perhaps, be read into existing treaty law: thus prohibiting abolitionist States from providing MLA to death penalty retentionist States for use in criminal proceedings that may result in the death penalty, without having first obtained death penalty assurances. Therefore, there is a possibility that such an international obligation can be established.

On this view, if an abolitionist State were to provide MLA to a retentionist State for use in a criminal proceeding which may result in the death penalty, without having obtained death penalty assurances, the State's conduct would not be in conformity with what is required of it by the aforementioned international obligation. Thus, the second condition required to establish an internationally wrongful act as provided by Article 2(b) of the ILC Articles would also be satisfied, as the abolitionist State would be in breach of an international obligation.

4.2. Potential Problems

However, as outlined in the preceding chapter, jurisdictional limits to human rights obligations may present an obstacle to finding an obligation in the context of this study. "A state […] owes no obligations to persons beyond its 'jurisdiction', and cannot incur direct responsibility should that person suffer from a rights violation."[191] If it was found that a jurisdictional link did not exist, then the provision of MLA without death penalty assurances may not breach any international obligation per se, in which case there would be no "internationally wrongful act" as defined in the ILC Articles (and thus not igniting the international responsibility of the abolitionist State).

[191] Hugh King, "The extraterritorial human rights obligations of states", in *Human Rights Law review,* Vol. 9(4), Oxford University Press, pp. 521-556, 2009, p. 539.

In the same line, it may be forwarded that the obligation to obtain death penalty assurances before providing MLA in the circumstances of this study is thus a political obligation, rather than a legal one. This may introduce problems with finding responsibility of the abolitionist State, as "responsibility only attaches to the breach of legal obligations."[192] When a State assumes a political obligation, they may incur political reprobation in the event of a breach, but they will not incur legal State responsibility in the sense presented in this chapter.

[192] *Supra.,* (note 25), Robert Kolb, p. 36.

5. State Responsibility for Complicity in an Internationally Wrongful Act

If jurisdictional limits ultimately impede the establishment of an international obligation in the context of this study, it would mean that that failure to obtain death penalty assurances would not attract the *primary* responsibility of the abolitionist State. However, the ILC Articles on State Responsibility provide another potential avenue, whereby the *derivative* responsibility of the abolitionist State may be established on the same facts.

Article 16 of the ILC Articles deals with the situation where one State assists in the commission of internationally wrongful act of another State. Article 16 provides that: where a State aids/assists another State in the commission of an internationally wrongful act by the latter State, the aiding State is internationally responsible for doing so if 1) the State does so with the knowledge of the circumstances of the internationally wrongful act; and 2) the act would be internationally wrongful if committed by the aiding State.[193]

5.1. Complicity

The concept of "complicity" is contentious, both in terms of formulation of legal doctrine, and in individual cases (domestically and internationally).[194] In the drafting of Article 16, the ILC discarded the term "complicity" for the more neutral sounding concept of "aid or assistance" of the ILC Articles.[195] However, courts and academic theorists alike frequently use the terms interchangeably. This study adopts the term "complicity" for the situations covered by Article 16 of the ILC Articles, principally for the convenience of not needing to refer each time to the phrase "aid or assistance in the commission of an internationally wrongful act".

Furthermore, although the term "complicity" originally stems from criminal law, the meaning and the elements of the concept differ in the State responsibility arena. Standards for accomplice responsibility vary in the various frameworks in which complicity (or aiding and

[193] ILC Articles on State Responsibility, Article 16.
[194] Jamie Gaskarth, "Entangling alliances? The UK's complicity in torture in the global war on terrorism", *International Affairs (Royal Institute of International Affairs,* vol. 87(4), pp. 945-964, 2011, p. 946.
[195] George Nolte and Helmut Aust, "Complicit States, mixed messages at international law", *The International and Comparative Law Quarterly,* vol. 58(1), pp. 1-30, 2009, p. 5.

abetting) is considered, for example in domestic tort law, international and domestic criminal law and in the law of non-contractual obligations.[196] Thus, this study reminds that interdisciplinary comparisons have limited usefulness, as complicity in each of these frameworks has independent meaning. This study thus seeks to establish the meaning of complicity (i.e. "aid or assistance in an internationally wrongful act") in the normative framework of Article 16 of the ILC Articles and in the human rights framework of the ICCPR and the ECHR, to ascertain if abolitionist States can be considered "complicit" in the death penalty through provision of MLA without requisite assurances.

5.2. The Limited Scope of Article 16

By the text of the provision, it is alluring to use Article 16 of the ILC Articles to argue that an abolitionist State attracts derivative State responsibility if, through providing MLA, it were to assist judicial execution in a foreign State. In principle, the assistance provided may be vitally important in the criminal proceeding (as in *Maha Elgizouli*), and thus make imposing the death penalty possible. Therefore, a clear causal/enabling connection can often be made between the MLA provided without having obtained death penalty assurances, and the imposition of a death penalty sentence.[197] However, the ILC Commentary to the Articles on State Responsibility limits the scope of Article 16 in a number of ways. Depending on the specific circumstances, some of these limitations can be rather easily resolved, while others may be fatal to the claim.

5.2.1. Easily Resolved Limitations

The ILC Commentary provides that the relevant State organ providing assistance (here, the State organ providing MLA) must be aware of the circumstances making the conduct internationally wrongful.[198] This may be relatively easily resolved of present purposes, as abolitionist States are aware that it is internationally wrongful if they were themselves to

[196] Helmut Aust, *Complicity and the Law of State Responsibility*, Cambridge University Press, 2011, p. 194.
[197] Similar argument made with regards to extradition in *Mohammad and Another v President of the Republic of South Africa and Others,* (*supra.,* (note 93))., paras. 54 and 61.
[198] ILC Commentary on Article 16, paras. 3-4. See also, *Supra.,* (note 25), James Crawford, p. 149.

subject individuals to the death penalty. Furthermore, inline with paragraph 4 of the ILC Commentary on Article 16, the abolitionist State is very likely to be "[…]aware of the circumstances in which its aid or assistance is intended to be used by the other State",[199] (i.e. that the MLA will be used in a criminal proceeding that may result in the death penalty). Therefore, it is likely that this first limitation can be easily resolved in the case at hand.

This leads to the other easily resolvable limitation provided in the ILC Commentary: that the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.[200] This is also easy to satisfy for present purposes: States that have ratified a treaty prohibiting imposition of the death penalty would fulfil this element if they were to impose the death penalty.[201] Thus, this would encompass abolitionist States party to the ECHR and/or the ICCPR.

5.2.2. The Subjective Element – Intent or Knowledge?

The Commentary to the ILC Articles also provides that the aid/assistance must be given "with a view of facilitating the commission of that act."[202] The ILC elaborates on this, stating that the aiding State will not be responsible under Article 16 unless 1) the State organ concerned *intended*, by the assistance given, to facilitate the occurrence of the wrongful conduct; and 2) that the wrongful conduct actually occurred.[203]

This presents two problems. First, "[i]t is hardly ever the case […] that abolitionist States directly intend to bring about the death penalty through their conduct."[204] Second, the act (the death penalty, or a death penalty sentence) would actually have to occur. Thus, if responsibility ensued, it would do so only upon the death penalty sentence being imposed (not upon the act of providing MLA without having obtained death penalty assurances), as "there is no such concept as an attempted internationally wrongful act."[205]

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[199] ILC Commentary on Article 16, para. 3. See also, *Supra.,* (note 25), James Crawford, p. 149.
[200] ILC Commentary on Article 16, paras. 3 and 6. See also, *Supra.,* (note 25), James Crawford, p. 149.
[201] *Supra.,* (note 1), Bharat Malkani, p. 527.
[202] ILC Commentary to Article 16, para. 3. See also, *Supra.,* (note 25), James Crawford, p. 149.
[203] ILC Commentary to Article 16, para. 5. See also, *Supra.,* (note 25), James Crawford, p. 149.
[204] *Supra.,* (note 1), Bharat Malkani, p. 527.
[205] *Supra.,* (note 196), Helmut Aust, p. 396.

Regarding the first problem, the ILC Commentary thus suggests that the abolitionist State, through providing MLA, *intended* to facilitate or contribute to the imposition of the death penalty. On this reading, knowledge of the activities of the other State is insufficient, it must be established that the MLA is supplied for the purpose of assisting the foreign State in the commission of the death penalty.[206] However, in almost all cases this would very difficult to prove. In the context of this study, States may always argue that they are not specifically intending to facilitate the death penalty by providing MLA, they are intending to assist in the criminal proceeding (regardless of sentencing outcome). Thus, on a strict reading, complicity per Article 16 could fail at this level.

However, there is disagreement about the precise scope of the subjective element of complicity in Article 16. As Article 16 may not in and of itself be determinative of the issue of complicity,[207] arguments have been forwarded to question if "intent" is actually required.[208] One such argument is that "intent" has not been explicitly adopted into the language of Article 16, it is only mentioned in the ILC commentary, despite the original draft Article on complicity (then, Article 27) explicitly containing the word "intention".[209] Further, upon amendment, ILC members themselves were uncertain whether the new Article 16 required intent, or just knowledge that the assisted State will or may use the assistance to commit an internationally wrongful act. This can be seen in the following statement from the Report from the ILC's Fifty-First Session:

> "Questions were also raised with respect to the meaning of the phrase "with knowledge of the circumstances of the internationally wrongful act". Did it mean that the assisting State must have the intention of facilitating the commission of the internationally wrongful act, or was it sufficient that it had knowledge of the fact that the assisted State would use the aid or assistance to commit an internationally wrongful act? What should be done about cases of uncertainty, e.g., where there was a risk that the assisted State would so act, but it was not certain?"[210]

[206] Bernhard Graefrath, "Complicity in the law of international responsibility", *Revue Belge De Droit International*, vol. 29(2), pp. 370-380, 1996, p. 376.
[207] See subheading 5.3. of this study, *"Lex Specialis"*
[208] For comprehensive discussion of arguments questioning requirement of complicity, see Kate Nahapetian, "Confronting state complicity in international law", *UCLA Journal of International Law and Foreign Affairs,* vol.7(1), pp. 99-128, 2002.
[209] *Ibid.*, p. 107.
[210] International Law Commission, *Report of the International Law Commission to the General Assembly,* Fifty-First Session (3 May-23 July 1999), UN. Doc. A/54/10, para. 258. See also *Supra.,* (note 208), Kate Nahapetian, p. 107.

Furthermore, it has been argued that the object and purpose of Article 16 would be defeated by an intent requirement.[211] It goes without saying that it is problematic to establish psychological elements of States, insofar as a State does not have its own "will" in the sense that individuals do.[212] Further, the need to prove that the State supplying assistance wanted to support the wrongful act is a very stringent test. Thus, "it seems highly questionable that such a narrow interpretation of intent as a decisive criterion for complicity is really useful",[213] as it may render the whole notion of complicity at international law unworkable. If intent is required, "liability will only be found in the most limited of instances where a country makes clear its intentions to facilitate human rights abuses. Countries will rarely declare these intentions, and meeting the intent requirement without these declarations will prove near impossible."[214] The intent requirement has thus been heavily criticised by commentators, as it makes it easy for assisting States to evade accountability: "the inclusion of the intent requirement […] would prevent punishing countries that enabled human rights abuses simply because they did not intend such a result, although they were fully aware of it."[215]

Due to the above, it is argued here that the intent requirement is not required to ascertain complicity in this context. While intent may not be required, "there is near unanimity in the literature that responsibility under Article 16 [of the ILC Articles] requires some subjective relationship between the assisting State and the commission of the wrongful act by the main actor."[216] Discussions on complicity in torture by the UK Joint Committee on Human Rights ("JCHR") provide relevant comments here, suggesting that the assisting State's *knowledge* of the real and imminent risk that the aid provided might assist the commission of an internationally wrongful act is sufficient to satisfy the subjective element of complicity. For example, in the JCHR's report regarding allegations of UK complicity in torture, the JCHR noted that complicity in torture "means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place".[217] Thus, the JCHR does not refer to "intention" as a requirement for complicity,

[211] *Supra.,* (note 208), Kate Nahapetian, p. 126.
[212] *Ibid.,* p. 241. Note, proving subjective intent or knowledge in individuals also presents significant problems.
[213] *Ibid.*
[214] *Supra.,* (note 208), Kate Nahapetian, p. 110.
[215] *Ibid.*
[216] *Supra.,* (note 196), Helmut Aust, p. 231.
[217] Joint Committee on Human Rights ("JCHR"), *Twenty-Third Report of 2008-09: Allegations of UK Complicity in Torture,* HL 152, HC 230, 21 July 2009, available at:

rather it considers knowledge of the real and imminent risk of torture, including constructive knowledge, to suffice.[218] The extradition cases discussed in Chapter 2 also suggest that proof of intent in not required, whereby "the responsibility of the sending state is not based on intent but solely on actual or even *constructive* knowledge"[219] of the risk in the foreign State for the individual in question.[220]

Due to the above arguments, this study submits that abolitionist States can incur responsibility for aiding imposition of the death penalty by foreign States, even when they do not directly intend their assistance to do so. It is enough that such States knew (or ought to have known) that the provision of MLA might facilitate the use of the death penalty.[221] In the case of provision of MLA without obtaining death penalty assurances, it is clear that upon MLA request, States are made aware of the circumstances of the criminal trial, aware of which crimes are punishable by death in the MLA-receiving State, and thus aware that provision of MLA in the prosecution may, by consequence, assist the use of capital punishment in the foreign State. The State's knowledge that its conduct may assist use of the death penalty can generally be inferred from the circumstances and from its actions (for example, from information provided by the MLA-seeking State in the MLA request, from observation that an individual is indicted on capital charges, from documentation of the abolitionist State contemplating whether or not to seek death penalty assurances, or death penalty assurance requests that have been refused by the MLA-receiving State). For example, in *Maha Elgizouli,* UK's knowledge that it may facilitate use of the death penalty through its provision of MLA can be construed from the fact that it sought death penalty assurances in the first instance (as it was aware of the risk of death penalty), and then, upon US refusal to provide such assurances, the UK provided the requested MLA, despite the risk of judicial execution. This study submits that in such circumstances, regardless of whether or not the UK *intended* to facilitate the death penalty, the UK's unquestionable knowledge that the provision of MLA under these circumstances could facilitate the death penalty equates to a sufficient subjective element to satisfy Article 16.

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http:/www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm (last visited 6 April 2020), para. 35. See also *supra.,* (note 1), Bharat Malkani, p. 530.

[218] *Supra.,* (note 1), Bharat Malkani, p. 531.

[219] Aristoteles Constantinides, "Extradition", in André Nollkaemper, Ilias Plakokefalos, Jessica Schechinger and Jann Kleffner (Eds.) *The Practice of Shared Responsibility in International Law,* Cambridge University Press, pp. 128-161, 2017, p. 150.

[220] Regarding conceptual differences between extradition/*non-refoulement* cases and complicity, see subheading 5.6. of this study.

[221] *Supra.,* (note 1), Bharat Malkani, p. 531.

5.2.3. Internationally Wrongful Act *of the Committing State*

Another problematic criterion of Article 16 is that responsibility only arises where a State voluntarily assists another State "in carrying out conduct which violates the international obligations of the latter."[222] Thus, the State committing the allegedly wrongful act must be legally prohibited from doing so.[223] This is problematic, as the State in which the criminal proceeding (and thus death penalty) is occurring is a death penalty retentionist State, and thus very unlikely to have legally bound itself to prohibit the death penalty in its jurisdiction. It is only those States who are parties to treaties that prohibit judicial execution that would be committing an internationally wrongful act by imposing such a sanction, not a State who has taken on no such obligation at international law.

This presents a problem for cases such as the aforementioned *Maha Elgizouli,* as the US, for example, is not party to a treaty prohibiting the death penalty, and nor is there a general rule of international law prohibiting the death penalty.[224] Thus, lending to the wording in Article 16, responsibility of the abolitionist State for complicity in an internationally wrongful act is not possible, as the retentionist State itself is not committing an internationally wrongful act by submitting an offender to the death penalty.

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[222] ILC Commentary to Article 16, para. 1. See also, *Supra.,* (note 25), James Crawford, p. 148. This can be seen directly in the wording of Article 16 itself: the State assists "in the commission of an internationally wrongful act *by the latter* […]" (italics added).

[223] *Supra.,* (note 1), Bharat Malkani, p. 527.

[224] Note, however, there is a continued trend in international law and in State practice towards prohibition of the death penalty. Very few States are expanding or introducing the use of the death penalty, and thus some argue there is a global trend toward abolition, and also a general rule of international law prohibiting the death penalty developing. See e.g. *Supra.,* (note 1), Bharat Malkani, p. 527; William Schabas, *The Abolition of the Death Penalty in International Law*, vol. 3, Cambridge University Press, 2003; Roger Hood, *The Death Penalty: A Worldwide Perspective,* vol. 4, Oxford, 2008. See also *supra.,* (note 9), *Maha Elgizouli* (SC decision , Lord Kerr at para. 148: "In his intervention in this case Professor Heyns suggested that "there is an emerging norm of customary international law that the death penalty as such is a violation of the absolute right against torture and cruel, inhuman and degrading treatment of punishment, and that a norm against the facilitation of the death penalty follows from that.""; See also, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary General,* A/67/279, 9 August 2012: "there is an evolving standard whereby states and judiciaries consider the death penalty to be a violation per se of the prohibition of torture or cruel, inhuman or degrading treatment … The Special Rapporteur is convinced that a customary norm prohibiting the death penalty under all circumstances, if it has not already emerged, is at least in the process of formation."; Furthermore, as noted in *supra.,* (note 1), Bharat Malkani, p.527, there are some general rules of international law governing use of the death penalty – for example prohibition of the death penalty for minors (under 18 years old). Thus, if a retentionist State were to impose the death penalty on such an individual, an MLA providing State would incur responsibility per Article 16.

5.3. *Lex Specialis*

However, as referred to earlier, Article 16 may not be determinative of the issue. Article 16 may be "remedied by resort to primary rules that take precedence as *lex specialis*",[225] as provided by Article 55 of the ILC Articles on State Responsibility. Article 55 provides that the ILC Articles "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."[226]

As it remains to be determined if Article 16 is a proper articulation of the concept of complicity, the Article can be superseded by the *lex specialis* on complicity in this context, if such primary rules are found to exist.[227] Assessment and interpretation is therefore required to determine what complicity means in the framework of primary (i.e. special) rules of international law, to enable proper interpretation of Article 16 in the context of State complicity in the use of the death penalty.

Chapter 2 of this study also significantly discusses abolitionist State facilitation of the death penalty from a human rights perspective. This study intends for the reader contemplate the subject matter of these two parts in unison, in the formation of the *lex specialis* on complicity in death penalty.

5.4. The Primary Rules of Complicity in the Death Penalty

The main duty for abolitionist States is simply to refrain from imposing the death penalty within their jurisdiction. However, as discussed throughout this study, it is possible that there also a secondary obligation, to refrain from aiding or assisting in the death penalty elsewhere. The foundation of the concept of "complicity" is a finding of responsibility of one State on the basis of another State's actions, which is justified by the secondary State's contribution to the act committed.

[225] *Supra.,* (note 219), Aristoteles Constantinides, p. 147.
[226] ILC Articles on State Responsibility, Article 55.
[227] *Supra.,* (note 1), Bharat Malkani, p. 528. Note, there is also discussion that Article 16 is customary – see e.g. the ICJ referring to Article 16 as reflecting a "customary rule" in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, International Court of Justice, Judgment of 26 February 2007, ICJ Reports 43[420].

The UN Office on Drugs and Crime ("UNODC") has recognised that through its work, there is potential for it to be complicit in the death penalty. In a 2012 position paper, UNODC provided that "If […] a country actively continues to apply the death penalty for drug offences, UNODC places itself in a very vulnerable position vis-à-vis its responsibility to respect human rights if it maintains support to law enforcement units, prosecutors or courts within the criminal justice system."[228] While UNODC is not a State, it is largely funded by States, including abolitionist States. The quote exemplifies the framework in which a State that provides MLA in the context of this study may incur derivative responsibility for its assistance in the death penalty. However, as mentioned earlier, in terms of complicity in death penalty, the fact that the conduct in question is not prohibited for the primary State is problematic for the finding of secondary responsibility.

5.4.1. The Obligation to Protect

The concept of prohibiting complicity in death penalty may be supported by the "obligation to protect" in human rights law, that being a positive obligation requiring States to take steps to prevent abuses of human rights occurring, either domestically or in foreign States.[229] For example, the right to life also contains the obligation to protect life, not only the obligation to abstain from unlawful killings. In the ECHR context, this can be seen in *Osman v UK,* where the ECtHR considered that authorities may breach Article 2 if it were established that they knew or ought to have known that there was a real and immediate risk to the life of the individual concerned from the acts of a third party, and the State failed to take reasonable measures to avoid that risk.[230] In the ICCPR context, Article 6 has also been read to require States to protect the right to life by preventing third party killing.[231] The connection between the obligation to protect and the law on complicity can be seen from, for example, the fact

[228] The United Nations Office on Drugs and Crime, *UNODC and the Promotion and Protection of Human Rights: Position Paper*, 2012, p. 10.
[229] *Supra.,* (note 1), Bharat Malkani, p. 528.
[230] *Osman v the United Kingdom,* European Court of Human Rights, Judgment of 28 October 1998, Application No. 23452/94, para. 116.
[231] *Supra.,* (note 77), General Comment 31, para. 8: "There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."

that the duty-holding State does not need to participate directly in the human rights abuse in order to have international responsibility.[232]

The obligation to protect in human rights law is applied in various contexts, justifying findings of State responsibility in situations where the actual violation is not attributable to the State in question. *Non-refoulement* is a very relevant context for the question of this study, whereby States "must take action – that is, not return someone to his [or her] home country – in order to protect that person from abuse by that country",[233] (and other analogues like prohibition of extradition, as frequently discussed throughout this thesis). The main idea here is that States should not place people in situations where there is risk of rights abuse: "the duty to protect requires States to ensure that they do not enable or assist a third party to engage in conduct that results in the violation of a right."[234] Depending on the context, through transferring the individual in question, the sending State significantly enables a third party to impose convention-contrary treatment (whether or not that treatment is prohibited for the receiving State), and "that enabling relationship seems to trigger the obligation to protect."[235] In the same way, it can be argued that an MLA-providing State who does not seek death penalty assurances significantly enables a third party (the retentionist State) to impose the death penalty, thus triggering the obligation to protect for the abolitionist State (given that the death penalty is prohibited conduct for the abolitionist State in question). In this sense, it can be argued that the obligation to protect is significantly linked to complicity in Article 16.

There are, however, distinctions that can be drawn between complicity and the obligation to protect. For example, as provided by Helmut Aust: "an infringement upon the prohibition of refoulement triggers the responsibility of the extraditing State regardless of whether the [human rights violation] eventually materialises. […] In situations covered by the concept of

[232] *Supra.,* (note 186), Monica Hakimi, p. 342.
[233] *Ibid.,* p. 343. See also See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), concluded 10 December 1984, entered into force 26 June 1987, UNTS vol. 1465, (obligation where there is a risk of torture); Convention Relating to the Status of Refugees, concluded 28 July 1951, entered into force 22 April 1954, UNTS vol. 189, Article 33 (obligation where life or freedom threatened by virtue of membership of a protected group); and *supra.,* (note 51), *Soering v the UK* – which established the *non-refoulement* principle in the ECHR (derived from Article 3). In this case, extradition was not permitted on the grounds that the long wait on death row would amount to treatment contrary to ECHR Article 3.
[234] *Supra.,*(note 1), Bharat Malkani, p. 528.
[235] *Supra.,* (note 186), Monica Hakimi, p. 367.

complicity [under the Articles on State Responsibility], no responsibility would intervene if the wrongful act of the main actor was never committed as there is no such concept as an attempted internationally wrongful act."[236] However, many say this is an artificial distinction (including Aust himself).[237]

Furthermore, the previous Draft Articles on State Responsibility contained, at Article 23, a specific Article dedicated to responsibility of States to prevent wrongful acts (i.e. the obligation to protect). The ILC's distinction between the two areas (by originally codifying them in 2 separate Articles) could be argued to be evidence of disparity between the two concepts. Moreover, the absence of an article to this effect in the current Articles on State Responsibility can be argued to be a rejection of the concept of State responsibility to prevent wrongful acts altogether.[238]

However, it can also be forwarded that "the reason for the disappearance of the old Article 23 […], as well as the disappearance of many rules already contained in the previous Draft, is that the present members of the Commission are of the opinion that such rules do not pertain to State responsibility (they were not secondary rules) but rather belong to the realm of primary rules."[239] On this reasoning, the obligation to protect is a primary rule, thus superseding Article 16 (as provided by Article 55 of the ILC Articles). It has also been argued that the ILC was wrong to draw a sharp distinction between the two concepts of complicity and obligation to protect, and rather, that the concepts "work in tandem when assessing the scope of obligations".[240]

The obligation to protect has been used to justify findings of State responsibility where one State enables a third party's wrongdoing, and yet that enabling action falls short of conduct necessary for attribution. In extraterritorial cases, there is conceptual confusion in this area. For example, the reasoning of the ECtHR regularly confuses why, for instance, a State having "decisive influence" in another State justifies a finding of State responsibility extraterritorially: does responsibility find its basis in attribution (whereby attribution ascribes

[236] *Supra.,* (note 196), Helmut Aust, p. 396. Also quoted in *supra.,* (note 1), Bharat Malkani, p. 529.
[237] *Supra.,* (note 196), Helmut Aust, p. 397; *supra.,* (note 1), Bharat Malkani, p. 529.
[238] See discussion on this in *supra.,* (note 1), Bharat Malkani, p. 529; and Benedetto Conforti, "Reflections on state responsibility for the breach of positive obligations: the case law of the European Court of Human Rights", *Italian Yearbook of International Law,* vol.13(1), pp. 3-10, 2003, p. 10.
[239] *Ibid.,* Benedetto Conforti, p. 10.
[240] *Supra.,* (note 1), Bharat Malkani, p. 529.

abuse to the assisting state, in which case a violation of the obligation to "respect" is found), or does the influence engage the State's obligation to protect (i.e. finding that the State violated its obligation to "protect" individuals from abuse by a third party, whereby the State is responsible as a bystander)? Monica Hakimi discusses this, and how the concept of complicity and the obligation to protect are connected. For example, in *Cyprus v Turkey,*[241] where the ECtHR found Turkey responsible as a result of abuses that the Turkish Republic of Northern Cyprus ("TRNC") committed, [242] the ECtHR acknowledged that the abuses where not demonstrably attributable to Turkey per the rules of attribution.[243] However, the ECtHR still found Turkey responsible, and the ECtHR "vacillated incoherently between suggesting: (1) that attribution was nevertheless appropriate; and (2) that Turkey had failed to satisfy an obligation to protect."[244] In her assessment of the ECtHR's decisions in *Cyprus v Turkey,* and *Ilaşcu v. Moldova and Russia*,[245] regarding extraterritorial reach of the ECHR, Monica Hakimi provides that:

> "In each case, the defendant state propped up and provided immense support to an abusive external actor. Turkey supported the Turkish Cypriot administration in northern Cyprus, and Russia did the same for the separatists in Moldova. But the claimants could not demonstrate that, since ratifying the European Convention on Human Rights, those states participated in the abuses at issue. The European Court of Human Rights nevertheless held them responsible. The court is unclear on why the defendant states are responsible. In the absence of evidence that the states participated in the particular abuses at issue, the correct answer lies in the obligation to protect. Turkey and Russia installed and provided considerable support to external actors that violated rights. Having extensively enabled those actors, the states could not lawfully stand by."[246]

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[241] *Supra.,* (note 148), *Cyprus v Turkey*.
[242] *Ibid.,* paras. 69-80.
[243] *Ibid.,* para. 76, the ECtHR states that: "It is not necessary to determine whether […] Turkey actually exercised detailed control over the policies and actions of the authorities of the TRNC". Note, there is much conceptual confusion in the ECtHR regarding the obligation to protect and attribution for the actual abuse. See *supra.,* (note 186), Monica Hakimi, pp. 353-354, and p. 377: "The court determined that Turkey's human rights obligations applied in northern Cyprus because Turkey exercised territorial control there. If those obligations applied because of Turkey's territorial control, then they presumably applied to all abuses in the relevant territory. Yet the court determined that Turkish responsibility flowed only from the abuses committed by the Turkish Cypriot administration (TRNC), and not from private abuses in the area. The court had difficulty explaining that distinction. Ultimately, it fudged its attribution analysis, justifying its finding by reference to Turkey's close relationship with the TRNC. If that relationship justifies the obligation, then it is unclear why territorial control matters."
[244] *Supra.,* (note 186), Monica Hakimi, p. 353. See also *supra.,* (note 148), *Cyprus v Turkey,* paras.76-77: where the ECtHR uses language indicative of an "obligation to protect", e.g. asserting that Turkey had to "secure" rights in that region.
[245] *Ilaşcu and Others v. Moldova and Russia,* European Court of Human Rights, Judgment of 8 July 2004, Application No. 44787/99.
[246] *Supra.,* (note 186), Monica Hakimi, pp. 365-366.

Decisions such as the above show that the obligation to protect is connected to complicity. Where a State enables a third actor's human rights violations, the State's obligation to protect may be engaged, whereby it cannot justifiably standby and do nothing. "[C]onduct akin to complicity (but short of the participation necessary for attribution) is […] relevant to appraising state bystander responsibility."[247] Similarly it can be argued here that where a State is asked to provide MLA for a criminal proceeding that may result in death penalty, the State is, if it provides the MLA, enabling imposition of the death penalty in the third State. This reality ignites the abolitionist State's obligation to protect (which it can fulfil through obtaining death penalty assurances, or withholding MLA in the absence of such assurances). If it fails to do this, the State violates its' positive obligation to protect, flowing from the right to life and right to be free from torture and inhuman or degrading treatment or punishment (as codified in ECHR and the ICCPR, and enhanced by their respective protocols abolishing the death penalty).

Therefore it is argued here that the obligation to protect may help remedy the limits of the law of complicity (and thus of Article 16 of the ILC Articles), whereby not all stringent requirements of Article 16 require total satisfaction. While discussing the topic of *non-refoulement*, Monica Hakimi provided that:

> "[a] state that transfers someone to another state, despite the risk of abuse, usually does not transfer the person 'with a view to facilitating' that abuse. Absent some indication to the contrary, the state's involvement does not rise to the level necessary for assisting responsibility [per Article 16]. Rather, the state is responsible because it fails to satisfy an obligation to protect."[248]

This shows that State responsibility for complicity is enhanced by the obligation to protect. The quote also exemplifies how State responsibility can be found even in the absence of full satisfaction of Article 16, (in the quote above, without proving that the transfer occurred "with a view to facilitating" the abuse, which textually a requirement of Article 16).[249]

The obligation to protect, formulated as a primary obligation, supersedes Article 66 (in accordance to Article 55 of the Articles on State Responsibility). "Put another way, even if an assisting State's conduct does not meet the stringent requirements for complicity under

[247] *Ibid.*, p, 354.
[248] *Ibid.*, p. 366.
[249] As discussed in subheading 5.2.2. of this study, "The Subjective Element – Intent or Knowledge?"

Article 16 as discussed above, that State may nonetheless be responsible because it failed to satisfy an affirmative obligation to protect."[250] Thus, as the general rule of Article 16 on complicity does not trump what is required by the primary (i.e. special) rules,[251] the obligation to protect (if considered a primary rule of law) supersedes the limits of Article 16. This is the normative environment in which Article 16 must be analysed.[252]

5.4.2. Complicity at International Law and Complicity in Torture

The law of complicity in death penalty can also be developed and complemented by analysing the law of state responsibility for complicity in other areas of human rights law, specifically of that in torture. The law of complicity in torture can specifically highlight what sort of conduct constitutes complicity in this area.[253] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT") explicitly prohibits complicity in torture, whereby Article 4(1) provides that State parties "shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."[254]

Unlike CAT, the ECHR and the ICCPR do not explicitly prohibit complicity in torture. However, prohibition of complicity in torture is implicit in the general prohibition of torture of these conventions, codified in Artilce 7 of the ICCPR, and Article 3 of the ECHR.[255] As discussed in this study, a form of complicity in torture has long been prohibited, that being prohibition of extradition/expulsion of an individual to a State where he or she is likely to suffer from torture or inhuman or degrading treatment or punishment.

Other findings of complicity in torture have been made in the ECHR context, which relate to extraordinary renditions. Extraordinary rendition is "a process by which a detainee is transferred to another State's custody outside regular legal proceedings and with the prospect

[250] *Supra.,* (note 1), Bharat Malkani, p. 529. End of quote quoting *supra.,* (note 186), Monica Hakimi, p. 354, (internal quotation marks omitted).
[251] *Supra.*, (note 196), Helmut Aust, p. 200.
[252] *Ibid.*
[253] *Supra.,* (note 1), Bharat Malkani, p. 531.
[254] CAT, Article 4(1).
[255] *Supra.,* (note 1), Bharat Malkani, p. 526.

of being subjected to torture or at least cruel, inhuman or degrading treatment."[256] The issue of complicity has been highlighted in such cases as secondary States can, to varying degrees, be held to have facilitated the maltreatment of individuals by the primary State. This has been shown specifically in the ECHR context, where European State support in unlawful rendition cases included things like "the granting of over flight rights, the provision of secret detention facilities […], and cooperation in the exchange of intelligence material."[257] For example, in the case *Al Nashiri v Poland,*[258] Poland was found responsible under the ECHR for its part in CIA rendition activities. The ECtHR concluded that Poland's enabling action[259] made it complicit in the ill-treatment of the Applicant, and thus Poland was found to have violated, among other Articles, Articles 2 and 3 in conjunction with Article 1 of Protocol 6 (due to the substantial and foreseeable risk that the individual in question would be subjected to death penalty).[260]

In the context of extraordinary renditions, the Secretary General of the CoE discussed the issue of complicity, stating that:

> "In accordance with the generally recognised rules on State responsibility, States may be held responsible for aiding or assisting another State in the commission of an internationally wrongful act. There can be little doubt that aid or assistance by agents of a State party in the commission of human rights abuses by agents of another State acting within the former's jurisdiction would constitute a violation of the Convention. Even acquiescence and connivance of the authorities in the acts of foreign agents affecting Convention rights might engage the State party's responsibility under the Convention."[261]

The meaning of complicity in torture at international law varies somewhat depending on the specific source and context analysed. As discussed, international criminal law's definition of the concept varies from that of State responsibility. According to the International Criminal

[256] *Supra.,* (note 1), Helmut Aust, p. 120.
[257] *Ibid.,* p. 120.
[258] *Supra.,* (note 58), *Al Nashiri v Poland*. For other rendition and complicity cases, see e.g. *El-Masri v The Former Yugoslav Republic of Macedonia,* European Court of Human Rights, Judgment of 13 December 2012, Application No. 39630/09; and *Abdulkhakov v Russia,* European Court of Human Rights, Judgment of 2 October 2012, Application No. 14743/11.
[259] Enabled the CIA to use a Polish airport, provided logistics, complicit in disguising movements of the rendition aircraft, cooperation with the whole process and so on (accompanied by conclusion by the ECtHR that Poland knew of the nature and purposes of the CIA's activities on its territory).
[260] *Supra.,* (note 58), *Al Nashiri v Poland,* paras. 576-579.
[261] Council of Europe, *Report of the Secretary General on the Use of His Powers under Article 52 of the European Convention of Human Rights,* Report SG/Inf, 2006, para. 23.

Tribunal for the former Yugoslavia ("ICTY"), thus in the context of individual criminal responsibility, findings of complicity in torture require satisfaction of 3 elements: 1) knowledge that torture is taking place; 2) a contribution by way of assistance; and 3) that the contribution has substantial effect on the perpetration of the crime itself.[262] However, CAT's monitoring body, the UN Committee Against Torture ("CAT Committee"), takes a wider view of complicity, whereby "acquiescence" and "tacit consent" is enough, as is constructive as well as actual knowledge that torture is taking place.[263] The CAT Committee is also does not appear to require that the assistance have substantial effect on the perpetration of the eventual torture.[264]

The JCHR discussed these two meanings, and distinguished them on the basis that the ICTY is dealing with individual criminal responsibility, while the CAT definition is focussed on State responsibility.[265] Thus, as mentioned earlier, the JCHR took the view that State complicity in torture "means simply one State giving assistance to another State in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place".[266] This is supported by the CoE Secretary General's comment above, that, in the context of rendition activities, "[e]ven acquiescence and connivance of the authorities in the acts of foreign agents affecting Convention rights might engage the State party's responsibility under the Convention."[267]

Further, in defining what amounts to State responsibility per Article 16 in terms of assistance in torture, the JCHR read the Articles on State Responsibility in conjunction with other rules and definitions in international law on complicity (like those stemming from CAT and the ICTY Statute).[268] This suggests, as argued in this study, that Article 16 is not determinative

[262] Article 7(1) of the ICTY Statute provides for individual criminal responsibility: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime." The 3 elements of complicity in ICTY derived from *Prosecutor v Anto Furundžija,* International Criminal Tribunal for the former Yugoslavia, Judgment of 10 December 1998, Case No. IT-95-17/1-T. See also
See also *supra.,* (note 217), JCHR, para. 31.
[263] *Supra.,* (note 217), JCHR, para. 32.
[264] *Ibid.*
[265] *Ibid.,* paras. 34-35.
[266] *Ibid.,* para. 35. See also *supra.,* (note 1), Bharat Malkani, p. 530.
[267] *Supra.,* (note 261), Secretary General of CoE, para. 23.
[268] *Supra.,* (note 1) Bharat Malkani, p. 531.

of the question of State complicity, thus supporting the argument that the limits of Article 16 can be overcome for the question at hand.

5.5. Overcoming Limitations

5.5.1. Internationally Wrongful Act *of the Committing State*: Part 2

The *lex specialis* of complicity in death penalty, as analysed in this chapter, exemplifies how Article 16 of the ILC Articles is not, in and of itself, determinative of the question of State complicity in capital punishment. With this in mind, we can return to one of the problematic criterions outlined at the beginning of this chapter, that Article 16 explicitly dictates that State responsibility only arises where a State voluntarily assists another State "in carrying out conduct which violates the international obligations *of the latter*",[269] (i.e. that the State committing the allegedly wrongful act must be legally prohibited from doing so).[270] As already discussed, this is problematic in the context of this study, as the State in which the criminal proceeding (and thus death penalty) is occurring is, most likely, a death penalty retentionist State, and therefore the State is not legally prohibited from imposing capital punishment. Thus, by the text of the provision, there is no internationally wrongful act for the abolitionist State to be complicit in.

However, this study again highlights that Article 16 may be "remedied by resort to primary rules that take precedence as *lex specialis*".[271] Relevant *lex specialis* can be located in extradition and *non-refoulement* cases, and unlawful rendition cases, as already discussed throughout this study. This study uses three examples from the ECHR framework, *Al-Saadoon and Mufdhi v the UK, F.G. v Sweden,* and *Al Nashiri v Poland*, to argue that complicity in death penalty can be found, despite capital punishment being legal in the principal State imposing it.

[269] ILC Commentary to Article 16, para. 1. See also, *Supra.,* (note 25), James Crawford, p. 148. (italics added). This can be seen directly in the wording of Article 16 itself: the state assists "in the commission of an internationally wrongful act *by the latter* […]" (italics added).
[270] *Supra.,* (note 1), Bharat Malkani, p. 527.
[271] *Supra.,* (note 219), Aristoteles Constantinides, p. 147; per ILC Articles on State Responsibility, Article 55.

In *Al-Saadoon and Mufdhi v the UK,* the ECtHR concluded that the UK violated the ECHR by transferring the applicants to Iraq, as there were substantial grounds for believing that there was a real risk of the applicants being subjected to the death penalty.[272] In *F.G. v Sweden,* the ECtHR concluded that, considering the alleged risk of the applicant facing capital punishment in Iran, Sweden would be in violation of Articles 2 and 3 of the ECHR if it removed the applicant to Iran without the Swedish authorities making and *ex nuc* assessment of the consequences of this conversion.[273] In *Al Nashiri v Poland,* Poland assisted in the unlawful rendition activities of the US, including assisting the US to secretly fly Al Nashiri out of Poland, despite the real and foreseeable risk that the applicant would be subjected to further torture and the death penalty in the US. The ECtHR found that the Poland's assistance in the transfer of Al Nashiri from Poland to the US, when where there was foreseeable risk of exposure to capital punishment, violated both Article 2 and 3 of the ECHR, stating that: "Article 2 of the Convention prohibits the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there."[274]

These cases are highlighted as they all have something in common: the death penalty is legally permissible for the State imposing the sanction (Iran, Iraq and the US). Thus, the State imposing (or potentially imposing) capital punishment in each case is not committing an internationally wrongful act by doing so. Despite this, the ECHR-contracting States in these cases (the UK, Sweden and Poland) were all found responsible under the ECHR for their involvement in the acts in question.

This is very relevant for ascertaining the *lex specialis* of complicity in death penalty, and the way in which Article 16 of the ILC Articles should be viewed. In these cases, the issue was not whether the receiving State would be in violation of international law if it executed the individuals in question.[275] The legal justification for prohibiting abolitionist States from

[272] *Supra.,* (note 37), *Al-Saadoon and Mufdhi v the UK,* paras. 144-145. Violation of Article 3 was found. In view of finding vilation of Article 3, the ECtHR stated: "the Court does not consider it necessary to decide whether there have also been violations of the applicants' rights under Article 2 of the Convention and Article 1 of Protocol No. 13."
[273] *Supra.,* (note 59), *F.G. v Sweden,* para. 110: "At the outset the Court observes that in the context of expulsion, where there are substantial grounds to believe that the person in question, if expelled, would face a real risk of capital punishment, torture, or inhuman or degrading treatment or punishment in the destination country, both Articles 2 and 3 imply that the Contracting State must not expel that person."
[274] *Supra.,* (note 58), *Al Nashiri v Poland,* paras. 576-579.
[275] *Supra.,* (note 1), Bharat Malkani, p. 535.

extraditing/expelling individuals to face the death penalty in retentionist States depends on the treaty obligations of the *sending State*. The same can be said for the assistance in the transfer of Al Nashiri in the unlawful rendition case of *Al Nashiri v Poland.* Poland's assistance in the transfer of the applicant to the US violated its obligations per ECHR Articles 2 and 3, due to Poland's abolitionist legal obligations per the ECHR, and irrespective of the legality of the death penalty in the US.

Such cases have exemplified how the threshold of Article 16 of the ILC Articles may have been modified in this respect: the abolitionist State can incur responsibility, based on the real risk of the death penalty, irrespective of the primary State's own responsibility.[276] Thus, this study submits that this textual limitation of Article 16 of the ILC Articles can be overcome in the case at hand. What is materially important is the obligations of abolitionist States with respect to the death penalty, and not whether the capital punishment-imposing State is itself in violation of an international obligation.

5.5.2. Wrongful Conduct Must Have Occurred

On the same line, as discussed earlier in this chapter, another limitation presented in the ILC Commentary to Article 16 is that the eventual wrongful conduct needs to have actually occurred.[277] Thus, as discussed, the act (the death penalty, or a death penalty sentence) would actually have to occur in order to establish responsibility of the abolitionist State for its provision of MLA per Article 16 of the ILC Articles (irrespective of the foreseeable risk of the imposition of capital punishment by the MLA-receiving State). Therefore, if responsibility ensued, it would do so only upon the death penalty sentence being imposed (not upon the act of providing MLA without having obtained requisite assurances) as, in the framework of the ILC Articles, "there is no such concept as an attempted internationally wrongful act."[278]

[276] *Supra.,* (note 219), Aristoteles Constantinides, p. 150.
[277] ILC Commentary to Article 16, para. 5. See also, *Supra.,* (note 25), James Crawford, p. 149.
[278] *Supra.,* (note 196), Helmut Aust, p. 396.

However, extradition cases have also exemplified how responsibility of the sending-State can be established for its complicity in wrongful conduct, regardless of whether or not this conduct eventually materialises. [279] Responsibility of the aiding State is often found before the extradition takes place, or after it takes place but before prosecution in finalised. This is due to the significant *risk* of capital punishment (or other proscribed ill-treatment). Thus, it is likely that this limitation can also be overcome in the case at hand. This "risk-based" responsibility is elaborated on in the following subchapter.

5.6. Conceptual Issues in Comparing *Non-Refoulement* (and Other Analogues) to Complicity

The conclusions in 5.5.1. and 5.5.2. above may be problematized by an important distinction between *non-refoulement*/prohibition of extradition and the concept of complicity. It can be argued that prohibition of extradition to face torture or the death penalty is not *complicity* in an internationally wrongful act; the exposure of a person to such risk is an internationally wrongful act in and of itself (if the question was to be reviewed per the ILC Articles and not under the framework of the conventions in question).[280] Thus, it can be argued that there is an international obligation incumbent on abolitionist States not to extradite under such circumstances; and thus, if a State were to extradite, it could be argued that this entails the *primary* international responsibility of that State per Article 1 and 2 of the ILC Articles, as opposed to derivative responsibility via Article 16. Thus, "[t]he responsibility of the State which has extradited or repelled the person is not triggered for the reason of its support to the eventual maltreatment, but for the fact that it exposed the individual to that danger."[281] As discussed throughout this chapter, within the concept of complicity under Article 16 of the ILC Articles, the wrongfulness of the aid or assistance is dependent on the wrongfulness of the main State's conduct, whereas primary responsibility is not concerned with another States wrongdoing.

[279] *Ibid.,* p. 397.
[280] Note, again, that although the ILC Articles are relevant considerations for establishing the responsibility of States in the ECHR and HRC context, the ECtHR and HRC generally fail to mention the ILC Articles at all in their jurisprudence. Thus, whether these extradition/expulsion/*non-refoulement* cases constitute primary responsibility or derivative responsibility is not discussed or ascertained in either context: "The ILC Articles are virtually never explicitly mentioned in HRC discussions or for that matter in those of other human rights treaty organs." (*Supra.,*(note 175), Malgosia Fitzmaurice and Dan Sarooshi, p. 167).
[281] *Supra.,* (note 196), Helmut Aust, p. 396.

In one sense this argument, alongside the discussed parallels between extradition to face the death penalty and provision of MLA in support of a criminal proceeding which may result in the death penalty, supports the argument of the preceding chapters, that provision of MLA under the circumstances of this study may attract the primary responsibility of the abolitionist State for independently wrongful conduct. However, as discussed, jurisdictional limits may impede the finding of primary responsibility in this context. Thus, some may argue that this distinction between complicity and extradition should be upheld, whereby the two should not be compared to build a case for prohibition of complicity in the death penalty through provision of MLA, as they are conceptually different structures from a legal point of view.

However, the interpretation that these are fundamentally different concepts relies on a very narrow view of Article 16 of the ILC Articles, which, as pointed out by discussions on the *lex specialis* on complicity, may not be legally accurate: "While Article 16 […] is the generally recognized form in which States may incur responsibility for complicity in international law, other forms of complicity exist and do not fall within the scope of this provision."[282] When examined closely, the structural differences between the complicity and *non-refoulement* are not very strong. For example, under both concepts, ultimately the wrongfulness is still dependent on the conduct of a third State:

> "If State A is about to extradite Person B to State C in which B is likely to suffer torture or inhuman and degrading treatment, the conduct of State C is decisive for both responsibility for complicity and *refoulement*. The difference lies in the fact that in the complicity scenario it needs to be established that the wrongful treatment of B has actually intervened whereas in the *refoulement* scenario it is sufficient that there are serious grounds to believe that B will be subjected to these forms of treatment. It is thus doubtful whether there exists a qualitative difference between these two conditions which would exclude the interpretation of the principle of *non-refoulement* as a form of *lex specialis* for complicity."[283]

From a broader perspective, while some differences exist between *non-refoulement* and complicity, the concepts are still significantly connected. Some, like Helmut Aust, suggest that prohibition of extradition to face torture or death penalty establishes "risk-based responsibility for complicity"[284] (whereby responsibility ensues due to the significant *risk* of maltreatment, regardless of whether or not the eventual conduct occurs, and regardless of

[282] *Ibid.,* p. 397.
[283] *Ibid.,* p. 397 (italics in original).
[284] *Ibid.,* p. 397.

whether or not the eventual conduct is legally prohibited or permissible for the primary State). This may be justified by the fundamental nature of the right to life and the right to be free from torture or inhuman or degrading treatment or punishment (and, perhaps, the right not to be subjected to the death penalty),[285] as these rights enshrine some of the most basic values of societies.[286] The lowering of the threshold is necessary in order to establish State responsibility in extradition cases, so that torture, capital punishment or extrajudicial killing can be prevented from occurring in the first place. Thus, the change from an assessment of whether or not wrongful conduct has actually been committed, or whether or not the conduct is internationally wrongful for the committing State, to the assessment of an intervening risk "is warranted from the viewpoint of an optimum protection of susceptible victims".[287] With this understanding, the position of this study is that the concept of *non-refoulement* (and other analogues) and the concept complicity codified in Article 16 actually complement each other, working in tandem in the assessment of complicity in the death penalty in the case at hand.

5.7. The Scope of "Aid or Assistance"

5.7.1. Contribution

This study notes that the *mens rea* element of complicity (the knowledge/intent discussion above) must also be accompanied by sufficient *actus reus* (whereby the aid or assistance must sufficiently contribute to the wrongful act in question in order for responsibility to ensue). The ILC has not defined what conduct constitutes sufficient "aid or assistance" to incur derivative responsibility per Article 16. Thus, questions arise as to how much contribution the secondary State needs to make in order to satisfy a finding of complicity. Nikolai Ushakov has highlighted the problem of contribution. He discussed that the aid/assistance cannot be too direct in character, as then the contributing State would become a

[285] *Supra.,* (note 37), *Alsaadoon v Mufdhi,* para. 118: "The court considers that, in respect of those states which are bound by it, the right under article 1 of Protocol No 13 not to be subjected to the death penalty, which admits of no derogation and applies in all circumstances, ranks along with the rights in articles 2 and 3 as a fundamental right".
[286] *Ibid.*
[287] *Supra.,* (note 196), Helmut Aust, p. 397.

co-author of the offence (and this goes beyond complicity). However, the participation also cannot be too indirect, as then there would be no real complicity in the act.[288]

The Commentary of the ILC in the Articles on State Responsibility adds some confusion on the matter. In its Commentary, the ILC has explained that "there is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act."[289] Thus, it would appear that significant contribution to the act is required. However, in another paragraph of the Commentary on Article 16, the ILC provides that in some cases "the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered."[290]

Causality is also a relevant consideration in the discussion of contribution. The ILC has also clearly stated that "the assisting State will only be responsible to the extend that its own conduct has *caused* or contributed to the internationally wrongful act."[291] Thus, it has been suggested that in determining what constitutes aid or assistance in Article 16, issues of causality need to be taken into account.[292] However, causality in international law is not a straightforward concept, and thus it does not really clarify the confusion noted above. While causality is relevant in the discussion, it is clear that any "but for" test of causality in reference to complicity is not required.[293] In cases where a "but for" or *condition sine qua non* circumstances are found, it may be more likely that independent responsibility of the "assisting" State would be found, [294] as, if a State has itself primarily *caused* an internationally wrongful act, why would it incur only derivative responsibility? However, while "but for" causality may not be required, it is clear that some form of causality will be necessary in questions of State complicity.[295]

[288] Nikolai Ushakov, *Statement at the 1519th Meeting of the International Law Commission*, Year Book of the International Law Commission, vol. I, 1978, p. 239, para. 11.
[289] ILC Commentary on Article 16, para. 5. See also *supra.,* (note 25); James Crawford, p.149.
[290] ILC Commentary on Article 16, para. 10. See also *supra.,* (note 25); James Crawford, p.151.
[291] ILC Commentary on Article 16, para. 1 (italics added). See also *supra.,* (note 25); James Crawford, p.148.
[292] *Supra.,* (note 196), Helmut Aust, p. 210.
[293] *Ibid.,* p. 212.
[294] *Ibid.*
[295] H. L. A. Hart and Tony Honoré, "Causation in the Law", Oxford University Press, 2nd Edition, 1985, p. 48.

The above emphasises the fact that what constitutes aid or assistance within the meaning of Article 16 is not all that clear. Evidently, not all acts of assistance will apply: "it is implausible that Article 16 should cover 'aid or assistance' which is only remotely or 'indirectly' related to an internationally wrongful act."[296] It has been discussed that contribution needs to be "significant" so as to "exclude any marginal participation".[297] It has also been stated that there must be some sort of special nexus between the aid and the wrongful act (albeit, as noted above, the conduct need not be an essential "but for" condition to the unlawful act taking place).[298] On assessment of what constitutes sufficient aid or assistance in the context of ILC Article 16, Helmut Aust provided that "it does not appear to be possible to provide abstract and normative criteria of what could constitute complicity in each and every conceivable situation. Rather, the assessment whether the support a State is rendering to another State constitutes aid or assistance within the meaning of Article 16 [of the ILC Articles] needs to be established with respect to the facts of the specific case."[299]

5.7.2. MLA-Providing State's Contribution to the Death Penalty

Thus, for the case at hand, if it were established that it is immaterial that death penalty is not an unlawful act of the MLA-receiving State, it must still be established if provision of MLA without obtaining death penalty assurances is sufficiently linked to the possibility of judicial execution that abolitionist States would incur responsibility for assistance in the death penalty. Drawing on the discussions of complicity in torture, in a supplementary memorandum to the JCHR, Philippe Sands stated that the contribution of the assisting State must have a "substantial effect on the perpetration of the crime".[300] In the same report, the JCHR also assessed and provided examples for what sort of conduct may constitute complicity in torture, which would thus attract responsibility per Article 16 of the Articles on State Responsibility. The JCHR provided that, among other examples, the following would amount to complicity in torture: "The provision of information to […] a foreign intelligence service enabling them to apprehend a terrorism suspect [who is then tortured]."[301] This is

[296] *Supra.,* (note 195), George Nolte and Helmut Aust, p. 10.
[297] *Supra.,* (note 262), *Prosecutor v Anto Furundžija,* p. 89. See also *supra.,* (note 194), Jamie Gaskarth, p. 950.
[298] *Supra.,* (note 194), Jamie Gaskarth, p. 950.
[299] *Supra.,* (note 196), Helmut Aust, p. 210.
[300] *Supra.,* (note 217), JCHR Report, Phillipe Sands' supplementary memorandum, ev. 79.
[301] *Supra.,* (note 217), JCHR, para. 43.

relevant in the context of complicity in death penalty through provision of MLA, as parallels can be drawn to between provision of information that leads to torture, and provision of information that leads to death penalty. If the former amounts to complicity in torture, surely the latter amounts to complicity in death penalty.

In the case at hand, provision of MLA without obtaining assurances that the death penalty will not be imposed does not simply make it materially easier for the MLA-receiving State to inflict harm on the individual concerned; in many cases, it may make it possible.[302] Thus, it is submitted here that provision of MLA in the context of this study is conduct sufficiently proximate to imposition of the death penalty by the latter State, and a form of "causality" in such circumstances can be established. The MLA provided, where the State specifically does not obtain death penalty assurances, can have a substantial effect on the criminal proceeding in question, and thus a substantial effect on the imposition of the death penalty. This is exemplified by the importance of UK evidence in the case *Maha Elgizouli,* where prosecution of El Sheikh in the US "depends critically on the evidence which has been obtained by the British authorities".[303] Thus, the position taken in this study is that provision of MLA without obtaining assurances has a special nexus to judicial execution in a foreign State, constituting sufficient "aid or assistance" to incur derivative responsibility in terms stipulated by Article 16 of the Articles on State Responsibility.

[302] *Supra.,* (note 219), Aristoteles Constantinides, p. 145.
[303] *Ibid.,* para. 33.

6. Conclusion

This study has analysed whether abolitionist States party to the ICCPR and/or the ECHR are prohibited from providing MLA to retentionist States for use in criminal proceedings which may result in death penalty, in the absence of assurances that the death penalty will not be imposed. When considering the extent to which abolitionist States can be held responsible in these circumstances, we are presented with a complex web of international legal doctrine. This study has considered how the relevant rules and principles operate and interact, with the aim of determining the conditions in which abolitionist States may be held responsible for facilitating the use of the death penalty through the provision of MLA.

At the outset, we have the primary rules and principles stemming from international human rights law (in the context of this study, those derived from the ICCPR and, at the regional level, from the ECHR). Running parallel to these rules are the ILC's Articles on State Responsibility, which direct when and how State action may entail the international responsibility of that State. The ECtHR and the HRC rarely discuss the ILC Articles in their judgments, and the "[t]he interplay between State responsibility under human rights law and State responsibility under the ILC Articles is not straightforward, and has caused much consternation for lawyers and commentators alike."[304] However, these frameworks are not mutually exclusive, and thus this study has assessed the research question through a unified perspective.

In the context of direct responsibility, the ILC Articles provide that "Every internationally wrongful act of a State entails the international responsibility of that State";[305] and defines that an act is internationally wrongful where: 1) the conduct is attributable to the State under international law; and 2) the conduct constitutes a breach of an international obligation of the State.[306] Attribution of conduct to the abolitionist State in the context of this study will generally be straightforward, as decisions to provide MLA stem from the abolitionist State's executive government. The more ambiguous element is that of subsection 2, whether there exists an international obligation on abolitionist States to withhold provision of MLA in the absence of adequate death penalty assurances.

[304] *Supra.,* (note 1), Bharat Malkani, p. 526.
[305] ILC Articles on State Responsibility, Article 1.
[306] ILC Articles on State Responsibility, Article 2(a)-(b).

Chapter 2 of this study assessed whether such an obligation can be discerned from the existing human rights law codified in the ICCPR and the ECHR, and their relevant additional protocols. This study examined vast parallels between the obligation on abolitionist States not to extradite individuals to face the death penalty, and the (proposed) obligation not to provide MLA which may assist imposition of the death penalty; arriving at the conclusion that recognition of the latter obligation is a natural and inevitable extension of the former. This conclusion is derived through uncovering the rationale of the HRC and ECtHR in recognising the obligation in the extradition context, primarily through discerning and analysing 1) the principle of non-facilitation of capital punishment; 2) the European framework's opposition to the death penalty "in all circumstances"; 3) the prohibition of reintroduction of capital punishment; and 4) examining how relevant conventions, as "living instruments", have and may evolve.

If the obligation on abolitionist States to withhold MLA in the absence of death penalty assurances was recognised, then, if a State proceeded to provide MLA without such assurances, this act would amount to a breach of this international obligation (thus satisfying Article 2(b) of the ILC Articles). This would, therefore, equate to an internationally wrongful act, entailing the direct international responsibility of the abolitionist State.[307]

However, there are conceptual discrepancies between extradition and the provision of MLA, which may prove fatal to recognising the international obligation asserted above. As discussed in Chapter 3, "Jurisdiction" in ECHR Article 1 and ICCPR Article 2(1), and in their relevant respective additional protocols, functions to delimit the individuals to whom States owe their human rights obligations (whereby State parties do not owe obligations to anyone beyond their jurisdiction). This is problematic in the context of this study, as the capital punishment-facing individual is not, and perhaps never was, in the territorial jurisdiction of the MLA-providing State. Conversely, in extradition cases, while the risk of death penalty is similarly located extraterritorially, the individual in question is, or was (in reactive cases), within the territorial jurisdiction of the abolitionist State. Therefore, a jurisdictional link can be drawn in extradition cases, whereby the abolitionist State is responsible for the conditions in which it forces the capital punishment-facing individual to exit its borders.

[307] ILC Articles on State Responsibility, Article 1.

While this may be so, it possible that existing categories of extraterritorial jurisdiction under the ECHR and the ICCPR can be further defined to establish a jurisdictional link in the context of this study. The abolitionist State's involvement in the foreign criminal proceeding can be argued to be an exercise of public powers in the retentionist State, whereby the MLA-providing State is producing effects extraterritorially. Moreover, the MLA-providing State can be argued to be exercising power and control over the capital punishment-facing individual, as "[t]he authorities are certainly exercising jurisdiction over the essential legal interests of the person regardless of their physical location."[308] Furthermore, there is also room to argue that "jurisdictional limits need not be determinative of the scope of abolitionist States' […] obligations to refrain from facilitating the use of the death penalty elsewhere."[309] The argument here is that States should not be disposing of their own adopted laws and policies on human rights protection on a purely mechanical level.[310]

Ultimately, if jurisdiction cannot be established in the circumstances of this study, then the direct responsibility of the abolitionist State also cannot be established. However, provision of MLA under the circumstances of this study may, rather, be viewed as *complicity* in the death penalty, thus entailing the derivative, as opposed to primary, responsibility of the abolitionist State. The interplay between human rights law and the ILC Articles in the context of complicity is equally complex. The ILC Articles position on complicity is as follows:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."[311]

A purely textual reading of Article 16 and its accompanying commentary would prove fatal for the claim that abolitionist States are complicit in the death penalty in the circumstances of this study, as: 1) the act (death penalty) is not likely to be internationally wrongful for the

[308] *Supra.,* (note 3) Robert Currie, (page number unknown – no page numbers provided in SSRN version of text download).
[309] *Supra.,* (note 1), Bharat Malkani, p. 555.
[310] *Supra.,* (note 3) Robert Currie, (page number unknown – no page numbers provided in SSRN version of text download).
[311] ILC Articles on State Responsibility, Article 16.

capital punishment-imposing State;[312] 2) it would be rare that the abolitionist State intends to facilitate the death penalty through its conduct (and even if it did, this would be arduous to prove); [313] and 3) the allegedly wrongful act may never actually eventuate (whereby responsibility could not ensue upon the act of providing MLA despite a foreseeable risk of death penalty, and rather would only ensue upon capital punishment actually being imposed).[314]

However, the ILC Articles have a dynamic relationship with the broader international legal framework. As provided by Article 55 of the ILC Articles, relevant primary rules pertaining to the law of complicity in the death penalty take precedence over Article 16 (as *lex specialis*), and thus may remedy the aforementioned limits of the Article. Relevant primary rules in this area can be argued to be more "far reaching" than Article 16's formulation of complicity.[315]

Thus, the argument presented Chapter 5 is that Article 16 of the ILC Articles can be bolstered by the *lex specialis* on complicity in the use of death penalty, to overcome the aforementioned limits of the Article, and thus enabling recognition of the derivate responsibility of abolitionist States for provision of MLA without requisite assurances. Relevant *lex specialis* can be located in the "obligation to protect", the concepts of complicity located in other areas of human rights law, the obligation to refrain from imposing the death penalty, and the prohibition of extradition to face the death penalty. Consequently, this study arrives at the conclusion that, despite the legality of capital punishment in the sanction-imposing State, and in spite of the likely lack of intent of the MLA-providing State to assist the imposition of the death penalty, and regardless of whether or not capital punishment eventually materialises, abolitionist States may be found responsible for their "aid and assistance" in the death penalty through their provision of MLA.

[312] *Ibid.,* A State is responsible where it "assists another State in the commission of an internationally wrongful act *by the latter*" (italics added).
[313] ILC Commentary to Article 16, para. 3: the aid/assistance must be given "with a view of facilitating the commission of that act." The ILC elaborates on this at para. 5: stating that the aiding State will not be responsible under Article 16 unless the State organ concerned *intended*, by the assistance given, to facilitate the occurrence of the wrongful conduct.
[314] ILC Commentary to Article 16, para 5: the wrongful conduct (death penalty) must actually occur.
[315] *Supra.,* (note 196), Helmut Aust, p. 390.

Accordingly, this study considers that it is time to recognise that abolitionist States party to the ECHR and/or the ICCPR are prohibited from providing MLA for use in foreign proceedings that may result in death penalty, in the absence of adequate assurances that capital punishment will not be imposed. At its core, the reasoning is simple: to do otherwise would amount to facilitating a practice which is forbidden for that State.[316] The author sees no compelling reason to sustain the artificial divide between extradition and provision of MLA in the circumstances of this study. The same legal reasoning should apply here as in the transfer of persons: "states that have abolished capital punishment may not assist in bringing about the death penalty in other countries."[317]

In asserting the above, this study closes with the following statement by Lord Kerr in the Supreme Court judgment of *Maha Elgizouli*, where His Honour expressed his minority view that the law has in fact developed so as to prohibit abolitionist States from providing MLA to retentionist States in context examined in this thesis:

> "Law, [...] if it is operating as it should, must be responsive to society's contemporary needs, standards and values. It is a commonplace that these are in a state of constant change. That is an essential part of the human condition and experience. As a deeper understanding of the human psyche and the enlightenment of society increase with the onward march of education, tolerance and forbearance in relation to our fellow citizens, the law must march step-by-step with that progress. I am convinced that the adjustment to the […] law which I propose reflects the contemporary standards and values of our society."[318]

[316] Bharat Malkani, "Emerging Voices: Does International Law Forbid Complicity in the Death Penalty?", Opiniojuris website, published 15 August 2013, available at: http://opiniojuris.org/2013/08/15/emerging-voices-does-international-law-forbid-complicity-in-the-death-penalty/ (last visited10 April 2020).
[317] *Supra.,* (note 97), Special Rapporteur on extradition, summary or arbitrary executions, para. 102.
[318] *Supra.,* (note 9), *Maha Elgizouli* (SC decision), Lord Kerr minority judgment, para. 144.

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